IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1225

JOHN R. GAGNON, Warden,
Petitioner,

- v. -

GERALD H. SCARPELLI,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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GERALD H. SCARPELLI v. GAGNON

2 CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

12/16/68 Petition for a writ of habeas corpus (received on 11/22/68)

12/18/68 Order (KPG) directing respondent to file a return to the petition not later than 1/2/69, showing cause, if any, why the writ should not issue and certifying the true cause of the detention.

1/3/69 Response to Petition for Writ of Habeas Corpus.

1/16/69 Traverse to Show Cause Order.

2/19/69 Pre-trial conference (JWR) Stipulation of Facts to be filed by 3/4/69. Briefs ordered. Oral Argument set on 3/28/69 at 3:00 PM.

3/5/69 Petitioner's Brief.

3/6/69 Petitioner's Report Pursuant to Final Pre-Trial Order.

3/17/69 Respondent's Brief.

4/9/69 Petitioner's Reply Brief.

7/11/69 Petitioner's Letter Brief re Mootness.

8/4/69 Petitioner's Statement of Facts.

8/19/69 Respondent's amendment to statement of facts.

9/21/70 Opinion and Order (JWR) that application for writ of habeas corpus be granted, that the issuance of the writ be stayed for a period of 30 days from this date to enable Wis. Court to hold a hearing on petitioner's probation revocation, if it so desires, etc.

9/29/70 Motion of respondent for a Certificate of Probable Cause to appeal 9/21/70 Decision, to the U. S. Court of Appeals, 7th Circuit.

10/1/70 Certificate of Probable Cause granted (JWR).

10/9/70 Respondent's Noticeof Appeal from order entered on 9/21/70. (copy mailed to Shellow, Shellow & Coffey, 660 E. Mason St. Milw. Wis. on 10/9/70)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Gerald H. Scarpelli)
19635-A)
Full name and prison number)
(if any) of Petitioner) Case No. *68-C-387*
vs.) (To be supplied by
John R. Gagnon) the Clerk of the
Name of Respondent) District Court)

PETITION FOR WRIT OF HABEAS COPRUS
Filed December 16, 1968

* * *

4 4. The date upon which sentence was imposed and the terms of the sentence:

(a) July 9, 1965 - 15 years confinement in the Wisconsin State

(b) Reformatory at Green Bay, said sentence was stayed and I was'

(c) placed on seven (7) years probation.

* * *

5 10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) I was not given a hearing of any kind before a judge or magistrate of any kind to this day, to have reasons presented and proven as to why my probation should be revoked.

(b) I was not afforded the right to counsel at any probation hearing.

(c) I was not afforded the rights of probation under the laws of the state of Illinois in which I was residing.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Section 1 of the Fourteenth Amendment of the Constitution of the United States: "Nor shall any state deprive

any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(b) The Sixth Amendment of the Constitution of the United States: "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.

6 (c) Chapter 57 Wisconsin State Statutes: 57.13 (2), "That each receiving state (Ill.) will assume the duties of visitation of and supervision over probationers or parolees or any sending state (Wis.) and in the excercise of those duties will be governed by the same standards that prevail for its own probationers and parolees. Under the probation laws of Illinois, I would have definitely had counsel and a hearing before a judge and confronted with the charges of my probation violation. I was not afforded any such rights, I was arrested at my place of employment in Illinois, and forcibly and bodily carried by Wisconsin authorities across the state line into Wisconsin, directly to prison.

* * *

8 *Gerald H. Scarpelli,* being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Gerald H. Scarpelli
Signature of Affiant

[Jurat Omitted in Printing]

14 RESPONDENT'S RESPONSE TO PETITION

Filed January 3, 1969

[Caption omitted in printing]

* * *

FIRST DEFENSE

The petition fails to state a claim against the respondent upon which relief can be granted.

SECOND DEFENSE

1. Petitioner was convicted of armed robbery in violation of sec. 943.32 (1) (b) and (2), Wis. Stats., on July 9, 1965, in the county court of Racine county, Branch II, Honorable Howard J. DuRocher, judge presiding, and was thereupon sentenced to the Wisconsin State Reformatory at Green Bay, Wisconsin, for an indeterminate term of not more than 15 years, execution whereof was thereupon stayed and petitioner was placed on probation for a period of 7 years, as
15 more fully appears from the annexed certified copy of the Order of Probation and of the Information marked Exhibits "A" and "B" respectively and made a part hereof.

2. On July 9, 1965, petitioner signed the Parole Agreement and a Travel Permit and Agreement to Return, copies of which marked Exhibits "C" and "D" are hereto annexed, and on August 5, 1965, after petitioner had returned to Illinois pursuant to the Travel Permit, his supervision was accepted by the Adult Probation Department of the circuit court of Cook county, Illinois, pursuant to the interstate compact for out-of-state parolee supervision, otherwise known as the "Uniform Act for Out-of-State Parolee Supervision" (sec. 57.13, Wis. Stats.) as shown by the letter of August 5, 1965, a copy of which marked Exhibit "E" is hereto annexed and made a part hereof.

3. Pursuant to said compact, all formalities of extradition are waived with reference to persons being supervised in other states under its provisions; and therefore petitioner's return to Wisconsin without extradition was lawful.

THIRD DEFENSE

4. On August 20, 1965, petitioner's probation supervisor recommended to the State Department of Public Welfare that petitioner's probation be revoked by reason of his association with known criminals and his involvement in a burglary on August 5, 1965. On the same day the district administrator concurred in said recommendation and on August 27, 1965, the chief of probation and parole services made the same recommendation, all as more fully appears from the case history review, a copy of which marked Exhibit "F" is hereto
16 annexed and made a part hereof; that on September 1, 1965, the said Department made an order revoking his said probation, a copy of which marked Exhibit "G" is hereto annexed and made a part hereof and on September 5, 1965, petitioner was received at the Wisconsin State Reformatory pursuant to his said sentence as shown by the Acknowledgement of Admission to the Institution, a copy of which marked Exhibit "H" is hereto annexed and made a part hereof.

5. The said revocation proceedings were made pursuant to the law of Wisconsin which provides for administrative revocation of probation without a hearing (sec. 57.03 (1), Wis. Stats.); the file of the Department contains ample reliable evidence of petitioner's violation of his probation sufficient to sustain the administrative action revoking it consisting in part

of a transcript of a statement given by petitioner on August 5, 1965, to Mr. Robert J. Smart, an Assistant State's Attorney of Cook county, Illinois, marked Exhibit "I" and annexed hereto, and a newspaper clipping relating the circumstances of the burglary taken from the Chicago Tribune of August 6, 1965, containing a photograph of petitioner identified as one of the burglars captured at the scene, a copy of which marked Exhibit "J" is hereto annexed and made a part hereof.

FOURTH DEFENSE

6. Under the law of Wisconsin the courts do not have inherent jurisdiction to stay execution of sentence and grant pro-
17 bation, but their authority to do so is dependent upon the existence of statutes authorizing the same (*Drewniak v. State ex rel. Jacquest*, (1942) 239 Wis. 475, 1 N. W. 2d 899); having applied for and accepted the benefits of such statute, petitioner is estopped to contest its validity in order to escape its burdens. He accepted a form of probation subject to administrative revocation without a hearing and he cannot now be heard to complain that his constitutional rights were thereby in any manner violated.

Dated at Madison, Wisconsin, this 2nd day of January, 1969.

BRONSON C. LA FOLLETTE
Attorney General

/s/ Wm. A. Platz
WILLIAM A. PLATZ
Assistant Attorney General

Attorneys for Respondent.

Post Office Address:

114 East, State Capitol
Madison, Wisconsin 53702

19 Exhibit A - Certified Copy of SENTENCE AND ORDER OF PROBATION

STATE OF WISCONSIN
COUNTY COURT *RACINE* COUNTY

STATE OF WISCONSIN *19635-A*

vs. SENTENCE IMPOSED AND STAYED *1107 7-15-65 35*

GERALD H. SCARPELLI
Defendant

At a *Reg. April '65* term of this court, held at the city of *Racine* in the county of *Racine,* Wisconsin, the above named defendant, hereinafter referred to as the aforesaid, was duly convicted of the offense of *"ARMED ROBBERY"* in violation of Sec. *943.32 (1) (b) (2)* of the Wisconsin Statutes, and sentenced to confinement in the *Wisconsin STATE REFORMATORY* at *Green Bay, Wisconsin,* Wisconsin, for the period of *fifteen (15) years;* beginning this day at noon, and it appearing to the satisfaction of this court that the aforesaid is eligible for probation pursuant to the provisions of Chapter 57 of the Statutes of the State of Wisconsin:

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED:

1st That execution of the aforementioned judgment and sentence be stayed as provided in Chapter 57 of the Statutes:

2nd That the aforesaid be and is hereby placed on probation for the period of *seven (7) years* in the custody and control of the State Department of Public Welfare, subject to the rules and orders of said Department;

3rd That as a condition of probation the aforesaid shall make the following payments, in such manner as directed by the State Department of Public Welfare:

Restitution $ Costs $20.83 Support $

He will pay the costs of those proceedings and perform other conditions of his probation as may be imposed upon the defendant by his supervising agent. In the event of his failure to meet the conditions of his probation he will stand committed under the sentence all ready imposed.

4th That the sheriff of said county is hereby ordered and directed to deliver the aforesaid into the custody of the State Department of Public Welfare upon the direction of said Department;

5th That a certified copy of this order be filed in the office of the State Department of Public Welfare together with a certified copy of the aforesaid's probation questionnaire.

Dated *July 9*, 1965

By the Court */s/ Howard J. DuRocher*
County Judge - *Br. II*

Exhibit "A"

20 Exhibit B - INFORMATION

STATE OF WISCONSIN
COUNTY COURT — RACINE COUNTY
BRANCH No. 2

STATE OF WISCONSIN

vs.

GERALD H. SCARPELLI
Defendant

STATE OF WISCONSIN)
) SS.
County of Racine)

I, *JOHN PEYTON,* District Attorney for Racine County, State of Wisconsin, do hereby inform the Court that on the *5th* day of *April* A.D. 1964, at the *Township of Burlington* and County of Racine, Wisconsin, said defendant,

Did then and there feloniously, unlawfully, and intentionally, while armed with a dangerous weapon, to-wit: a revolver, and by threatening the imminent use of force against C. Leslie Reddick, compel the said C. Leslie Reddick to acquiesce in the taking and carrying away of his property, contrary to the form of the Statute, Section *943.32 (1) (b) (2)* in such case made and provided, and against the peace and dignity of the state of Wisconsin.

Dated at Racine, Wisconsin, this *20th* day of *July,* A.D. 1964.

/s/ John Peyton
District Attorney,
Racine County, Wisconsin

21 **Exhibit C - AGREEMENT**

In consideration of Probation or Parole being granted me, I agree to the following:

1. I will make a sincere attempt to avoid all acts which are forbidden by law and contrary to public welfare or my own best interests.

2. I will, to the best of my ability, take advantage of the opportunitites offered me by probation or parole; I will practice temperance, conduct myself honestly, and assume my obligations as a citizen and as a member of the community in which I live.

3. I will keep the Probation and Parole Agent informed of my whereabouts and activities at all times and I will submit such reports as may be required.

4. I will secure advance approval from the Probation and Parole Agent, in writing if practicable, if at any time I wish to:

    a. Purchase or operate a motor vehicle.
    b. Incur debts whether by borrowing money or installment buying.
    c. Take on additional responsibilities, such as marrying.
    d. Change employment or place of residence.
    e. Leave the state.
    f. Own or carry firearms or other weapon.

5. If I prove myself unsuited to supervision, I will hold myself ready to be placed in the institution to which I was committed, returned to the court which placed me on probation, or to the institution from which I was paroled.

6. I will be guided by such specific instructions as may be issued by the Probation and Parole Agent with regard to companions, hours, intoxicants, medical attention, family responsibilities and support of self, court obligations, or other special restrictions as follows:

Date *7-9-65*

Signed */s/ Gerald Scarpelli*

23 Exhibit E - LETTER

THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
ADULT PROBATION DEPARTMENT
CRIMINAL COURT BUILDING
2600 So. California Ave.
Chicago, Ill. 60608
Bishop 7-8016

WILLIAM D. MEYERING
CHIEF PROBATION OFFICER
VAL GOLES
SECRETARY

DEPUTY CHIEFS
LAWRENCE BREEN
JOHN M. HAAS
LEONARD J. PRYSTALSKI

IN REPLY PLEASE
REFER TO:

August 5, 1965

Mr. Sanger B. Powers
Interstate Compact Administration
P. O. Box 669
Madison, Wisconsin

Re: Gerald Scarpelli
Wisc. Prob. 19635-A

Dear Sir:

The above named subject resides with his wife and two children at 6904 W. Roosevelt Road, in Oak Park, Illinois. He is employed by the Park Trucking and Supply Company at 2025 Railroad Avenue in Glenview, Illinois. We will accept this case for supervision. Thanking you for your cooperation we remain.

Very truly yours,
William D. Meyering
Chief Probation Officer

By */s/ Leonard J. Prystalski*
Leonard J. Prystalski
Deputy Chief Probation Officer

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Exhibit F - CASE HISTORY REVIEW

* * *

* * * Action Recommended:

REVOCATION OF PROBATION

* * *

Recommendation submitted for the following reasons:*

The aforementioned has shown himself unsuitable for probation in that he:

1. Has associated with known criminals, in direct violation of his probation regulations and his supervising agent's instructions;
2. While associating with a known criminal, namely Fred Kleckner, Jr., was involved in, and arrested for, a burglary on the evening of 8/5/65 in Deerfield, Illinois.

Date *8/20/65* Submitted by *Thomas L. Meyer* Area No. *1107*

* * *

SECTION 2—ADMINISTRATOR'S ACTION

Recommendation:

Same as above.

Date *8/20/65* District *Racine-Kenosha* Administrator
/s/ R. M. Larsen J.J. Nuter for R.M. Larsen

SECTION 3—SPACE BELOW TO BE FILLED OUT AT CENTRAL OFFICE

Costs ordered *$2.83* Restitution ordered Support ordered

Costs unpaid *$2.83* Restitution unpaid Support due

Balance to credit with cashier Bonds on deposit

SECTION 4—ADMINISTRATIVE ACTION

Administrative Action: Revocation of probation is recommended for the following reasons:

1. The aforesaid has associated with known criminals, in direct violation of his probation regulations and his supervising agent's instructions;

2. The aforesaid while associating with a known criminal, namely Fred Kleckner, Jr., was involved in, and arrested for, a burglary on the evening of August 5, 1965 in Deerfield Ill.

Date *August 27, 1965*

By Delmar Huebner, Chief
Probation & Parole Services
Probation & Parole Services

25 Exhibit G - ORDER REVOKING PROBATION

THE STATE OF WISCONSIN: BEFORE THE STATE DEPARTMENT OF PUBLIC WELFARE

IN THE CASE OF:

Gerald H. Scarpelli Prob. #19635-A

IT APPEARING that GERALD H. SCARPELLI, hereinafter referred to as the aforesaid, was on the 9th day of July, 1965, convicted of the offense of Armed Robbery in violation of Section 943.32 (1) (b) (2) of the Statutes of the State of Wisconsin in the County Court, Branch II, of Racine County and sentenced to the Wisconsin State Reformatory for a term of fifteen years and that execution of the sentence in this case was stayed and the aforesaid was placed on probation for a term of seven years under the provisions of Chapter 57 of the Statutes;

IT FURTHER APPEARING in the reports submitted by the Division of Corrections that the aforesaid has not conducted himself in accordance with the rules and regulations of the State Department of Public Welfare with reference to persons placed on probation in that the aforesaid has violated said rules by the following:

1. The aforesaid has associated with known criminals, in direct violation of his probation regulations and his supervising agent's instructions;
2. The aforesaid while associating with a known criminal, namely Fred Kleckner, Jr., was involved in, and arrested for, a burglary on the evening of August 5, 1965 in Deerfield, Illinois.

IT IS NOW ORDERED that in accordance with the provisions of Chapter 57 of the Statutes the probation of the aforesaid be and hereby is revoked with the effective date of violation being August 5, 1965;

IT IS FURTHER ORDERED THAT the aforesaid be taken into custody and conveyed to the Wisconsin State Reformatory and that the Warden of said institution is hereby authorized and directed to receive the aforesaid and there keep him until discharged pursuant to law.

STATE DEPARTMENT OF PUBLIC WELFARE

/s/ Wilbur J. Schmidt
Director

Dated: SEP 1 - 1965

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Exhibit H - ACKNOWLEDGMENT OF ADMISSION TO INSTITUTION

TO WHOM THIS MAY CONCERN:

This is to certify that *Gerald H. Scarpelli Prob. #19635-A* whose *probation* was revoked on *September 1, 1965* by the State Department of Public Welfare of Wisconsin was received at this institution on *SEP 4 1965*, 19 , to serve the sentence applicable to the order appended hereto.

REMARKS:

/s/ Michel A. Skaff [*Initials*]
Warden, Superintendent or Jailer

WISCONSIN STATE REFORMATORY
Name of Institution

Date *SEP 5, 1965*

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27 Exhibit I - STATEMENT OF GERALD SCARPELLI, AUGUST 6, 1965, COMMENCING APPROXIMATELY 3:15 P.M.

PRESENT:

ROBERT J. SMART
Assistant State's Attorney

Lt. Glenn KOETS
Deerfield Police Department

William J. Wood, Jr.
Deerfield Police Department

Suzanne Abear
Secretary in the State's Attorney's Office

Questions by Mr. Smart: Will you state your name please?
A. Gerald Scarpelli.
Q. Spell your last name?
A. SCARPELLI.
Q. What is your address?
A. 6904 West Roosevelt Road.
Q. In what town?
A. Oak Park, Illinois.
Q. What is your age?
A. Twenty-six.
Q. Are you married?
A. Yes.
Q. What is your wife's name?
A. Nancy Lynn.

Q. Are you employed?

A. Yes.

Q. Where are you employed?

A. Park Trucking and Supply.

28 Q. My name is Mr. Smart. I am an Assistant State's Attorney. This is Lt. Koets of the Deerfield Police Department, and this is Officer William Wood of the Deerfield Police Department, and the lady here is Mrs. Abear, a secretary in the office. Do you understand that Mrs. Abear is taking our conversation down in shorthand?

A. I do.

Q. Do you understand that you have a right to remain silent; that is, you do not have to answer my questions?

A. I do.

Q. Do you understand that anything you say may be used against you in a Court of Law?

A. Yes.

Q. You have a right to legal counsel. Do you wish legal counsel at this time?

A. No.

Q. Has there been any promises made to you to induce you to give us this statement?

A. No, sir.

Q. Do you understand that if any promises were made to you they would not be binding upon this Office or the Court.

A. Yes.

Q. Were you involved in a burglary this morning, August 5th, 1965?

A. I was.

Q. Where was this burglary?

A. On Wilmot Road in Deerfield.

Q. Was anybody with you?

A. Yes.

Q. Who?

A. Fred Kleckner, Jr.

Q. What time was this burglary?
A. I don't know - just before 12:00 - 11:00 A.M.
29 Q. In the morning?
A. A. M.
Q. What time did you meet Mr. Kleckner prior to 11:00 A.M.?
A. 9:00 this morning.
Q. Where did you meet him?
A. He picked me up at my house.
Q. Was he driving?
A. Yes.
Q. What kind of automobile was he driving?
A. '59 Chevie.
Q. Two-door, four-door?
A. Four door.
Q. Then what did you do, if anything?
A. At 9:00, he picked me up and we drove—we got on the toll road. We got off on 22 and drove into Deerfield and then we drove around that area at Wilmot Road and North and picked names off mailboxes.
Q. How many names?
A. Six or eight names.
Q. Do you remember any of the names?
A. No, sir, I don't, except this one.
Q. By this one, you mean which one?
A. Rustman.
Q. What did you do then, if anything?
A. Then we went to a restaurant on 22 in Half Day and we looked names up in a phone book and called the numbers we did get—the one that didn't answer was Rustman.
Q. What time did you make the calls?
A. Before 11:00. 10:30.
Q. Do you remember the name of the restaurant?
A. Polly's Cafe.
Q. Then what did you do—if anything?

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A. We left the restaurant and drove to Rustman's house on Wilmot Road.

Q. Who was driving?

A. Fred.

Q. When you got there, what did you do?

A. I got out of the car and walked to the door and Fred went to park the car. I rang the bell. There was no answer. Then Fred walked up to the house with me.

Q. Then what happened?

A. He brought the bar and the gloves, opened the screen door. Then Fred broke the door off.

Q. How?

A. Just pried it open.

Q. Then what happened?

A. Fred walked to the bedroom and I walked to the rear bedroom and the portable T.V. I picked up. It was on a stand.

Q. What kind of T.V. was it?

A. I don't remember, but it was a brand new one.

Q. Then what happened?

A. Put the T.V. in the hallway, looked in jewelry boxes and then Fred looked out the window and saw the police cars.

Q. What window?

A. I don't know what window—the front of the house.

Q. What did he say to you?

A. He said, there's cops outside. I asked where the back door was, and the next thing I knew, he jumped through the window and then I followed him through.

Q. What was the reason for entering this house?

A. We were going to burglarize it for merchandise or money.

Q. Are you saying you were going to steal objects from the house?

A. Yes.

31 Q. Can you describe the outside of the house?

A. No, I can't. Just a white house.

Q. Was it two story?

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Q. Brick, wood, siding?
A. Think it was wood.
Q. It was white, you say?
A. Yes.
Q. As you entered the house, what room did you go into?
A. There's a hallway when you walk through the door—right down the hallway to the bedroom.
Q. Did you go in any other rooms besides the bedroom?
A. No, we weren't around there that long.
Q. Can you describe the bedroom?
A. All I can remember is the dresser.
Q. What do you remember about the dresser?
A. The jewelry box was on top.
Q. How many jewelry boxes were there?
A. Two, I think. And the T.V. near the door on a stand.
Q. Did you take any jewelry?
A. No.
Q. How long were you in the house?
A. About three minutes maybe—maybe not even that long.
Q. What happened after you jumped through the window?
A. We were in the back yard. There was police by the far corner of the house. He hollered for me to stop. I ran into the bushes.
Q. What happened then?
A. That's it.
Q. You were found in the bushes?
A. I went a little ways then they found me.
32 Q. What time did you enter the house approximately?
A. Around 11:00.
Q. Do you remember what direction the house faces?
A. Well, I'm mixed up in directions—it faces Wilmot Road. It's on a corner.
Q. You mentioned the car was parked on North Avenue?
A. North and Wilmot Road.

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Q. Had you and Kleckner made plans about the burglary that day?

A. I don't know what you mean.

Q. Had you talked about it this date?

A. Yes, we did.

Q. When?

A. Talked about it this morning. He called me up.

Q. What did he say?

A. Not too much. He just asked me if I wanted to go out. I said yes.

Q. Has this statement been given freely by you?

A. Yes, sir.

Q. Has there been any threats made against you or coercion used to give this statement?

A. No.

Q. Has there been any promises made to give this statement?

A. No.

Q. How have you been treated by the Deerfield Police?

A. Good.

Q. Did they give you a meal—lunch—dinner?

A. Yes.

Q. How have you been treated by myself?

A. Very good.

Q. Do you have any complaints about myself or the police officers or the State's Attorney's Office?

A. No, sir.

33 Exhibit J - NEWS ARTICLE, CHICAGO TRIBUNE, AUG. 6, 1965

BURGLAR SHOT AS TWO FLEE HOME

Smash Window in Attempt to Escape

Two burglars plunged thru a thick glass window of a home in Deerfield yesterday in an attempt to escape policemen who responded to a burglar alarm and trapped them in

One of the men was shot in the back and wounded critically when he ignored police warnings to halt. The other escaped into a nearby field and was captured an hour later.

Police Use Planes

Police of eight other communities as well as sheriff's police and state police joined Deerfield police in the search for the man who fled. Planes provided by sheriff's police and state police also were used in the search.

Fred Kleckner Jr., 31, of 1315 S. Home av., Berwyn, an ex-convict, was wounded when he ignored the warning of Policeman William Butler, Kleckner, was reported in critical condition in Highland Park hospital. His confederate was identified as Gerald Scarpelli, 26, of 6904 Rossevelt rd., Oak Park.

Kleckner and Scarpelli pried open a rear door at the home of Jacob H. Rustman of 1555 Wilmot rd., Deerfield, and entered the building unaware that opening the door had sounded a burglar alarm in the police station.

Police Guard Doors

Three minutes later Policemen Butler and Allan Cramer arrived, stationed themselves at the rear and front doors, and called to the men inside to come out.

Instead, Kleckner and Scarpelli dived headlong thru an insulated window, with glass three-eighths of an inch thick, on the side of the six-room ranch type home.

When Scarpelli ran into the field, Butler and Cramer radioed for help. Police units responded from Lake Forest, Highland Park, Northbrook, Mundelein, Wheeling, Mill Creek, and Round Lake Beach, as well as Lake county deputies and state police.

Burglarized Before

Scarpelli was captured by Northbrook Policeman Jay Mills about two blocks from the Rustman home.

Lt. Glenn Koets of the Deerfield police said Rustman, who is president of the Jefferson Ice and Fuel company in Chicago, had the burglar alarm installed after $1,500 worth of jewelry and household goods was taken in a burglary Sept. 29, 1963.

Lt. Koets said that inside the Rustman home a television set had been moved to a door and jewelry boxes were found on beds where the burglars had placed them.

Police said Rustman was at work in Chicago and his wife, Eleanor, was at a beauty shop when the burglars entered the home.

The car used by Kleckner and Scarpelli was found parked two blocks from the Rustman home.

* * *

Members of Gang

Joseph Balzrina, Lake county sheriff's investigator, said that Scarpelli admitted that he and Kleckner were responsible for many burglaries in Lake county in the last 18 months.

Balzrina said they operated with five other men, all now in prison, as a gang that also staged burglaries in Cook, Du Page, and McHenry counties.

Kleckner served three years in the state penitentiary for armed robbery and was arrested last year, along with Scarpelli and another man, in connection with the $30,000 holdup of the Colonia club in Burlington, Wis., Scarpelli said he was on seven years probation for the Wisconsin holdup. Scarpelli was one of two men identified last year by an Oak Park woman

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34 [Photograph of 4 men]

Gerald Scarpelli, burglar captured after fleeing Deerfield home, shows policemen the cuts on hand and wrist he suffered when he and Fred Kleckner Jr. dashed thru picture window to evade police at doors of home.

* * *

36 PETITIONER'S TRANSVERSE [sic]
Filed January 16, 1969
[Caption omitted in printing]

The Petitioner above named, for a tansverse to the show cause order for a writ of habeas corpus answers as follows:

* * *

37 RETURN TO THE THIRD DEFENSE

4. On August 20, 1965, petitioner's probation supervisor recommended to the State Dept. of Public Welfare that petitioner's probation be revoked, strictly on heresay information. Illinois burglary charges were never proven against petitioner. He could have proven his innoncence of these Deerfield Ill. burglary charges in open court in Ill., but Ill. chose to drop these charges against him.

* * *

8 5.(b) If an unsigned statement given under extreme pressure, without counsel, and as a part of a deal with the police, and a newspaper story is the ample, reliable evidence of petitioner's probation violation, then respondent has a very weak and shaky case indeed. In other words, any police officer or citizen can at any time issue to the Wis. Welfare Dept. an inflammatory or deragatory statement against the petitioner, and petitioner will stand as in violation of his probation?

In the Chicago Tribune picture allegedly of this petitioner, showing cuts on hand and wrist; In actual and true fact, their was one small cut on petitioner's lower palm on the right hand, which was one day old on August 5, one day before the alleged burglary was to have taken place. Petitioner suffered this cut in a fall at work, and he so informed Deerfield authorities of this fact at the time of arrest on Aug. 5, 1965.

In the Chicago Tribune article where petitioner allegedly (admitted he and Kleckner were responsible for many burglaries in Lake County in the last 18 months) this statement is completly untrue and petitioner never made any such statement to any newspaper reporter or to any police officer, or to anyone. However Mr. Balzrina, Lake County sheriff's investigator, did in fact, himself make this statement to reporters. Mr. Balzrina also said petitioner operated with five other men in Cook, DuPage, and McHenry counties as a gang staging burglaries. What are these other burglaries and what are these other five men's names? Petitioner doesn't know and Mr. Balzrina doesn't know, but these types of stories were good publicity for Mr. Balzrina and they help sell many newspapers. None of these newspaper statements have been proven or used against petitioner in court, except by the Wis. Welfare Dept. to violate petitioner's probation.

In regards to the statement made by petitioner to Mr. Smart,
39 this statement is not signed by petitioner and therefore not worth the paper it is written on. Said statement was made as a part of a deal contrived by Mr. Balzrina, Lake County Sheriff's investigator, in return, Mr. Balzrina gave his solemn word that petitioner's name would not be printed in the newspapers as involved in the alleged burglary. That there would be no publicity of any kind, and the Wis. authorities would definitly not be notified as to a possible condition of probation violation.

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Mr. Balzrina was the second man to get his hands on petitioner after Northbrook Policeman Jay Mills came upon petitioner over two blocks from the scene of alleged burglary. Immediately upon seeing petitioner, Mr. Balzrina attempted to strike him with the stock of a shotgun, Mr. Balzrina was restrained by policeman Jay Mills. Mr. Balzrina made numerous threats of physical harm and in abuse in front of numerous witnesses. At this time Mr. Balzrina also said to petitioner he, Balzrina, knew that petitioner was involved in alleged burglary because Kleckner was involved in said burglary; therefore petitioner just had to be the other suspect.

Petitioner was taken to the Deerfield Police station where he was handcuffed to a chair causing his cut hand to bleed a little. Petitioner was slapped in the face twice by Mr. Balzrina, and threatened to be returned to Wisconsin to have his probation violated. Mr. Balzrina insisted and swore that the suspect caught in the yard of the Rustman home was Fred Kleckner Jr., and that said suspect was mortally wounded and in fact deceased at the time of interrogation by Balzrina. Lt. Koets and officer William Wood of the Deerfield police dept. also gave their word to petitioner that Kleckner was dead. Mr. Balzrina informed petitioner that he was in a position to send petitioner back to Wis. for 15 years imprisonment, if word of this burglary got out to the Wis authorities. Petitioner was not involved in the alleged burglary but because petitioner was in the neighborhood and a suspect, said petitioner was very nervous, worried and freightened. Petitioner was not allowed to make any phone calls, Mr. Balzrina told petitioner as long as no formal charge was placed against him, petitioner did not need any lawyer. Mr. Balzrina told petitioner if he would make a statement admitting the burglary and implicate Fred Kleckner Jr. who was dead, there would be no story of the burglary in any news media, then petitioner would have no

worry about Wis. authorities violating him. Mr. Balzrina told petitioner Deerfield would set a low bond on him and he could return to his family, and that petitioner would never be convicted of the burglary on such flimsy evidence in court. Mr. Balzrina gave his word and swore all the things he told petitioner were the God's truth. At the time petitioner thought the deal to be attractive since it would not hurt anybody, Kleckner was dead, according to Balzrina, and if an unsigned statement would keep Balzrina off petitioner's back and keep petitioner out of prison, petitioner was ready to say just about anything. Petitioner's statement to Mr. Smart is untrue and completely made up. If petitioner would have been quite able to prove his innocence of the burglary charge in court, and petitioner can still prove his innocence of the Deerfield burglary charge.

PETITIONER'S STATEMENT OF FACTS
(Filed August 4, 1969)
[Caption omitted in printing]

On July 9, 1965, the petitioner entered a plea of guilty to a charge of armed robbery in violation of §943.32 (1) (b) (2), Wis. Stat., and was sentenced on that date to an indeterminate term of not more than fifteen (15) years at the Wisconsin State Reformatory, Green Bay, Wisconsin, by the Honorable HOWARD J. DuROCHER, County Judge, Branch 2, Racine County, Wisconsin. Execution of the sentence was stayed and petitioner was placed on probation to the State Department of Public Welfare for a period of seven years.

On July 9, 1969, petitioner signed a "Parole Agreement and a Travel Permit and Agreement to Return." He thereupon returned to Illinois and on August 5, 1965, the Adult Probation Department of the Circuit Court of Cook County, Illinois, accepted petitioner's probation supervision pursuant to the Uniform Act for Out of State Parolee Supervision.

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(§57.13, Wis. Stat.) The agreement signed by the petitioner provided that he waived extradition to the State of Wisconsin from any jurisdiction in or outside of the United States and that he would not contest any effort by any jurisdiction to return him to the State of Wisconsin.

On August 20, 1965, petitioner's probation supervisior recommended to the State Department of Public Welfare that petitioner's probation be revoked by reason of his association with known criminals and his involvement in a burglary. On the same day the District Administrator con-
47 curred in the recommendation and on August 27, 1965, the Chief of Probation and Parole Services made the same recommendation. Pursuant to these recommendations the Director of the State Department of Public Welfare, Wilbur J. Schmidt, entered an order revoking the petitioner's probation on September 1, 1965. The recommendations for revoking probation were based [in part] on on a transcript of a statement allegedly given by the petitioner on August 5, 1965 to Mr. Robert J. Smart, Assistant State's Attorney, Cook County, Illinois, and newspaper clippings from the Chicago Tribune of August 6, 1965, pertaining to a burglary. (The reports recommending revocation, the transcript of the statement and the newspaper clippings are exhibits F, G, I and J of Respondent's Reply to Petition.)

Pursuant to the revocation order, the petitioner was picked up in Illinois at his place of employment on September 3, or September 4, 1965, and was transported to the Sheriff's Office, Niles, Illinois. Shortly thereafter, on the same day, the petitioner was transported to the Racine County Jail. Petitioner was held overnight in the Racine County Jail and the following day was transported to the Green Bay Reformatory. Petitioner was received at the Reformatory on September 5, 1965. (See Exhibit H, Respondent's Reply to Petition.)

Page of Record

Petitioner was never afforded a hearing either by the State Department of Public Welfare or by the sentencing Court prior to the revocation of his probation and transportation to the Green Bay Reformatory. Further he was never granted a hearing of any kind in Illinois after he was picked up and prior to the time he was transported to the Racine County Jail. Petitioner was also denied an opportunity to consult with a lawyer of his own choosing or appointed counsel prior to the revocation of his probation, prior to his removal from the State of Illinois to the Racine County Jail and prior to his transportation to the Green Bay Reformatory.

On June 4, 1969, petitioner was released from the custody of the State of Wisconsin and was paroled to a federal detainer. Petitioner was previously sentenced to a term of eight (8) years
48 on a federal conviction. That sentence was to be served concurrent with the sentence in the State of Wisconsin. Petitioner is presently incarcerated at the Federal Correctional Institution at Leavenworth, Kansas. His status as it relates to the State of Wisconsin is that of "parolee."

* * *

49 Dated at Milwaukee, Wisconsin this 2nd day of August, 1969.

Respectfully submitted,

GERALD H. SCARPELLI
Petitioner

BY:

SHELLOW, SHELLOW & COFFEY

/s/ William M. Coffey
WILLIAM M. COFFEY

Attorney for petitioner.

50 RESPONDENT'S AMENDMENT TO STATEMENT OF FACTS

(Filed August 19, 1969)

[Caption omitted in printing]

On the second page, the 5th line, before the first word "on" insert "in part" and strike the second word "on" so that the line will read "The recommendations for revoking probation were based in part on a".

* * *

51

Respectfully submitted,

ROBERT W. WARREN
Attorney General

/s/ Wm. A. Platz
WILLIAM A. PLATZ
Assistant Attorney General

Attorneys for Respondent

52 OPINION AND ORDER GRANTING WRIT OF HABEAS CORPUS

(Filed September 21, 1970)

This opinion and order are printed in the Appendix to the Petition for Writ of Certiorari at pages 101-114.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AFFIRMING THE JUDGMENT OF THE DISTRICT COURT

(Filed December 28, 1971)

This opinion is printed in the Appendix to the Petition for Writ of Certiorari at pages 115-125.

Supreme Court of the United States

No. 71-1225 , [redacted]

John R. Gagnon, Warden,

Petitioner,

v.

Gerald H. Scarpelli

ORDER ALLOWING CERTIORARI. Filed June 26 ---------- , 1972.

The petition herein for a writ of certiorari to the United States Court of

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. ——

JOHN R. GAGNON,
Petitioner,

v.

GERALD H. SCARPELLI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, John R. Gagnon, hereinafter called the "warden," respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 28, 1971.

OPINIONS BELOW

The opinions below are not reported. They are printed in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1971. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 2101 (c).

QUESTION PRESENTED

Whether a person convicted and sentenced by a state court with execution stayed, placed on probation in custody of a state agency, independent of the court, having sole authority to revoke his probation and execute the sentence, has a Fourteenth Amendment due process right to a hearing with assistance of counsel on whether grounds exist to revoke his probation.

The Court of Appeals held in the affirmative.

STATUTES INVOLVED

Wisconsin Statutes 1965, 57.01 (1), 57.02 and 57.03 (1)

57.01 Probation of felons. (1) When a person is convicted of a felony (convictions under s. 52.05 excepted) and it appears to the court from his character and the circumstances of the case that he is not likely again to commit crime and that the public welfare does not require that he shall suffer the penalty of the law, the court may, by order, withhold sentence or impose sentence and stay its execution and in either case place him on probation to the department for a stated period, stating in the order the reasons therefor, and may impose as a condition of such order or of continuing it in effect that he shall make restitution or pay the costs of prosecution or do both. The period of probation may be made consecutive to a sentence of imprisonment on a different charge, whether imposed at the same time or previously. Consecutive periods of probation may be imposed. In case the conditions of probation are violated, the current probation and all subsequent consecutive probations shall be revoked.

57.02 Control of probationer. Except as provided otherwise in section 57.025, every probationer in the custody of the department shall be subject to the control of the department under regulations applicable to paroled persons. Upon the entry of the order of probation the court or the clerk of the court shall deliver a certified copy of the record in the case to the department, whereupon the custody of the probationer vests in the department.

57.03 Return to court; discharge. (1) If a probationer in its charge violates the conditions of his probation, *the department* may order him brought before the court for sentence which shall then be imposed without further stay or *if already sentenced may order him to prison;* and the term of sentence shall begin on the date he enters the prison. *A copy of the order of the department shall be sufficient authority for the officer executing it to take the probationer to court or to prison.*

STATEMENT OF THE CASE

The respondent was convicted on July 9, 1965, in the circuit court for Racine county, Wisconsin, of armed robbery and sentenced to not more than 15 years imprisonment, execution was stayed and he was placed on probation in the custody of the State Department of Public Welfare (since renamed the State Department of Health and Social Services) for a term of seven years.

Pursuant to the interstate compact for parole and probation supervision (see 4 U.S.C. §112) he was permitted to go to Illinois for supervision. On August 5, 1965, a day-time burglary occurred in Deerfield, Illinois, respondent was arrested nearby, made a full confession to an assistant state's attorney and was photographed by a Chicago Tribune staff photographer showing cuts on his hand and wrist suffered in his flight through a broken window from the burglarized premises. On September 1, 1965, after recommendation by the probation and parole services, his probation was revoked by the State Department of Public Welfare and he was ultimately brought to the Wisconsin state reformatory and was subsequently transferred to the Wisconsin correctional institution of which petitioner is the warden.

On December 16, 1968, he filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin alleging denial of right to a judicial hearing on why his probation should be revoked, denial of right to counsel at any probation hearing and denial of "the right of probation under the laws of the state of Illinois." He based his claim on the due process clause of the Fourteenth Amendment and the Sixth Amendment guarantee of the right to counsel in criminal prosecutions.

Petitioner answered denying the sufficiency of the petition to state a claim on which relief can be granted and asserting the facts which led up to the revocation. The grounds alleged for revocation were association with known criminals and being involved in and arrested for the Deerfield burglary of August 5, 1965.

On September 21, 1970, the district court granted the application for the writ but stayed its order for a period of 30 days to enable a Wisconsin court to hold a hearing on respondent's probation revocation if it so desired. The petitioner (warden) appealed to the United States Court of Appeals for the 7th Circuit on October 1, 1970, and the order of the district court was affirmed on December 28, 1971.

Further facts are stated in the opinion of the district court contained in the Appendix.

REASONS FOR GRANTING CERTIORARI

I. The Decision Below Is In Conflict With The Ruling Decision Of This Court

This Court has held that there is no constitutional right to a hearing when probation is revoked. In *Escoe v. Zerbst* (1935), 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566, the Court said that the applicable District of Columbia *statute* gave petitioner a right to a hearing before revocation of probation but expressly cautioned that:

> "In thus holding, *we do not accept the petitioner's contention that the privilege has a basis in the Constitution,* apart from any statute. Probation as suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect

of its duration as Congress may impose. *Burns v. United States* 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 at 492." (Emphasis supplied)

Thus any right to such a hearing stems solely from a statutory grant and not from the United States Constitution. In the absence of statutory provision, the probationer is not entitled to a revocation hearing. Whether labeled "dictum" or not, this Court deliberately set forth the above statement of law in response to an argument advanced by a party. It has not been repudiated by this Court and it was relied upon by the Wisconsin legislature when it repealed the former requirement (Wis. Stats. 1945, sec. 57.03(1)) of a "personal hearing" in case of probation revocation by the department (Wis. Laws 1947, Ch. 477, sec. 5).*

In *Mempa v. Rhay* (1967), 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336, this Court carefully avoided any conflict with *Escoe* when it distinguished the case of a prisoner who had been sentenced before probation from one who had not; only in the latter case, that of *deferred sentencing*, is a hearing and the assistance of counsel constitutionally required, and then, inferentially only at the sentencing. This Court thereby avoided any suggestion that such rights applied to probation revocation proceedings as such. This was made abundantly clear in the later case of *McConnell v. Rhay* (1968), 393 U.S. 2, 4, 89 S.Ct. 32, 21 L.Ed. 2d 2:

> ". . . the right to counsel *at sentencing* must therefore be treated like the right to counsel at other stages of adjudication." (Emphasis supplied)

If *Escoe* is eroded by subsequent decisions relating to the dissimilar fields of unemployment compensation, public

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*An interim committee serving between the 1945 and 1947 sessions determined that hearings were unnecessary and provided for their abolition in its revision bill.

employment, and public assistance, the word should come directly from this Court. It is submitted that *Escoe* is still good law.

II. There Is A Conflict Among The Courts Of Appeal On The Point

In holding that there is no right to counsel at probation revocation hearings, the Court of Appeals for the 5th Circuit said in *Shaw v. Henderson* (1970), 430 F. 2d 1116, 1118-1119:

> "We hold the opinion that the right to counsel did not apply to the Lousiana probation revocation hearing here under scrutiny because Shaw was not sentenced at the hearing and no other substantial rights were affected or could have been affected at the hearing . . . Indeed he was under sentence from the beginning of his probation, but he was given conditional liberty which could be revoked when he violated the conditions imposed. We have consistently refused to interfere in traditional probation revocation proceedings unless there is a clear abuse of discretion. *Mempa* does not alter this principle."

The Court in *Perck v. Henderson* (E.D. La. 1970) 317 F. Supp. 29, 32, affirmed (1971), 444 F. 2d 102, added:

> ". . . that if a criminal defendant is represented by counsel at all critical stages of his trial, including sentencing, and is thereafter released on probation, he is *not* thereafter entitled to counsel at a subsequent probation revocation hearing."

A dictum contrary to the decision of the 7th Circuit herein is in the District of Columbia Circuit, Judge (now Mr. Chief Justice) Burger speaking for the court, in *Hyser v. Reed* (1963), 318 F. 2d 225, 236, involving *parole* revocation:

> "The legal proceeding most comparable to revocation of parole is revocation of probation. The Supreme Court has considered claims by probationers that they be accorded full dress hearings by the District Court before revocation and in each instance the Court has rejected the claim."

In accord with the decision below is *Hewett v. North Carolina* (4th Cir. 1970), 415 F. 2d 1316, which held that counsel must be appointed for indigent probationers in all revocation of probation proceedings. Unlike the *Scarpelli* Court which based the right to counsel on the due process clause of the Fourteenth Amendment, the court in *Hewett* characterized the revocation of probation as part of the criminal proceedings to which probationer's Sixth Amendment right to counsel applies.

III. The Decision Below Is In Direct Conflict With The Decision Of The Highest Court Of The State Of Wisconsin

In *State ex rel. Johnson v. Cady* (1970) 50 Wis. 2d 540, 185 N.W. 2d 306, the Wisconsin Supreme Court addressed itself to the issue of counsel at probation revocation hearings in those situations, as in *Scarpelli*, where the defendant was placed on probation after sentence had been imposed and stayed. The petitioner argued that due process, equal protection, the Sixth Amendment to the United States Constitution, and art. 1, sec. 7 of the Wisconsin Constitution compel the presence of counsel at such revocation hearings. The State Supreme Court rejected the contention. It unequivocally held that the assistance of counsel is not constitutionally required at probation revocation hearings:

"A minority of the courts of other jurisdictions have construed *Mempa* as not limited to its factual context, but rather have seen fit to extend the rationale of *Mempa*, and as so extended consider it to be authority for the right to counsel at probation and parole revocation hearings." (citing among other cases, *Scarpelli v. Gagnon* (E.D. Wis. 1970), 317 F. Supp. 72)

"However, the majority of courts considered *Mempa* to apply to its factual context, and thus not to require counsel at a parole or probation revocation hearing. *We here adopt the holdings of the majority and determine that the presence of counsel at the revocation hearing is not required.*" (Emphasis supplied)

IV. The Rule Announced Below Is Undesirable

Sec. 57.02, Wis. Stats. 1965 (now sec. 973.09), provides that in all courts in Wisconsin except those in Milwaukee County, a person placed on probation is in the custody of the state department of public welfare (now health and social services). In cases like *Scarpelli* where the court has already imposed sentence, the department, not the court, orders the probationer to prison and his sentence begins. The control and supervision of probationers, including the power to revoke probation upon the violation of specified conditions, is delegated to the authority of this administrative department. Sec. 939.10 Stats. The situation at hand is thus similar to *parole* revocation in Wisconsin and sister states in that the jurisdiction and supervision of such proceedings is removed from the judicial branch and vested in the state's executive department. See sec. 57.06, Wis. Stats; Smith-Huico Ill. Anno. Stats. 38, sec. 123-1; Cal. Penal Code, sec. 3040.

The Court below correctly held that *Mempa v. Rhay* (1967), 389 U.S. 128, with its emphasis on the Sixth Amendment right to counsel in criminal proceedings, did not extend beyond the imposition of sentence into the probationary proceedings. Fundamental fairness under the due process clause, likewise, does not necessitate the presence of counsel at these purely administrative hearings.

The probationer received the fullest assistance of counsel at all critical stages of the criminal proceedings. His sentence has been imposed by the court and cannot be enlarged at a revocation hearing. No right of appeal or other proceedings remain to be exercised or waived by the defendant to test the propriety of the guilty verdict. The judicial powers have become finalized, and only administrative actions would be affected by probationer's counsel at these revocation proceedings. Imposing the constitutional right to counsel upon the administrative hearing would serve neither the state's nor the probationer's interest.

Both the department and the probationer share a common goal, the successful rehabilitation of the probationer. See sec. 46.01, Wis. Stats. The presence of counsel and the consequent adversary nature of the revocation hearing would work contrary to this purpose. Speaking within the comparable context of parole revocation, the present Chief Justice when a member of the Court of Appeals for the District of Columbia said in *Hyser v. Reed* (1968), 318 F. 2d 225 at 237, 238:

> "The Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible.

> Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae. In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege. "Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders." Williams v. People of State of New York, 337 U.S. [241] at 249, 69 S.Ct. [1079] at 1084 [93 L.Ed. 1337]. Perhaps the more correct view is that retributive justice is satisfied by the conviction whereas the sentence is a process of treatment. It is important to bear this in mind in determining whether there would be any gain to the parolee or to society in taking steps urged by the dissenting opinions which tend to equate parole processes with criminal prosecutions."

In the performance of their duties, department personnel, including probation and parole officers, are called upon to exercise professional judgment and discretion in determining whether a probationer is fulfilling the conditions of his probation. They are college trained in their field, holding in many cases advanced degrees, and have regular in-service training. By their educational background and experience, they are thoroughly competent to perform their treatment and supervisory functions. Attorneys, on the other hand, are not well suited by their training and duties to the client to assist the department in objectively ascertaining the most suitable disposition for a given probationer. As expressed by the Third Circuit Court of Appeals in *Washington v. Hogan* (3rd Cir. 1960), 287 F. 2d 332, 335, in discussing the usefulness of lawyers at parole revocation hearings:

> "The period of contentious litigation is over when a man accused of crime is tried, defended, sentenced and, if he wishes, has gone through the process of appeal. Now the problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole."

Lawyers' numerous objections to certain testimony may severely limit the extent and breadth of the department's inquiry into the probationer's rehabilitative efforts and the events surrounding the alleged probation violation. Aggressive direct and cross-examination may well inhibit probation and parole agents from freely expressing their professional judgments. From the natural reluctance to "take the stand," they may refuse to report all but the most gross violations of probation conditions; the department's control and supervision over the probationer's attempted rehabilitation would thereby diminish. An adversary revocation hearing would also place the probation or parole agent in the undesirable role of state "prosecutor;" his personal relationship with the probationer would be strained and any therapeutic value arising from the probationer-agent relationship would no doubt suffer.

Lengthy and litigious revocation hearings would needlessly divert valuable department personnel time and expertise away from their already overburdened caseloads and administrative functions. The likely logistic problems and delays would result in a reduction of the probation officer's time available for field supervision and personal contact with his probationers.

Rather than expend substantial public funds for the dubious benefit of counsel at these revocation hearings, the state could better use them for the acquisition of additional talented department personnel, such as correctional administrators and social workers including probation and parole officers. They, not lawyers, are prepared to alleviate the present excessive caseload problem.

This is not to argue that probationers may be subjected to unfair treatment or made the victims of wholly arbitrary or capricious decisions during the revocation hearings. We simply submit that the treatment process is not assisted by the presence of counsel, and that assistance of counsel is not constitutionally compelled to assure the essential fairness of these administrative probation revocation hearings.

It is therefore respectfully submitted that certiorari should be granted.

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APPENDIX

ORDER OF THE DISTRICT COURT GRANTING WRIT OF HABEAS CORPUS

Gerald H. Scarpelli has filed a petition for writ of habeas corpus pursuant to §2241, et seq., Title 28, United States Code of Laws. The petition challenges the legality of the procedure used to revoke his probation. The petitioner's probation was revoked by the Wisconsin State Department of Public Welfare without affording the petitioner a hearing. The petitioner claims that this action taken against him is in violation of both the due process and equal protection clauses of the Fourteenth Amendment. For the reasons set forth below, I have concluded that the revocation of petitioner's probation without a hearing was impermissible and that, therefore, the petition for writ of habeas corpus must be granted subject to the special conditions set forth at the conclusion of this opinion.

FACTS

On July 9, 1965, the petitioner, upon entering a plea of guilty, was convicted of armed robbery in violation of § 943.32 (1) (b) (2), Wisconsin Statutes, in the County Court of Racine County, Wisconsin. The petitioner was sentenced on that date to an indeterminate term of not more than fifteen years at the Wisconsin State Reformatory, Green Bay, Wisconsin. However, execution of the sentence was stayed and the petitioner was placed on probation to the State Department of Public Welfare for a period of seven years.[1] On the same date, the petitioner signed a "Parole Agreement and a Travel Permit and Agreement to Return" and was allowed to return to Illinois which was, at that time, his home. Pursuant to the Uniform Act for out-of-state parolee supervision,[2] the Adult Probation Department of the Circuit Court of Cook County, Illinois, accepted the probation supervision responsibilities over the petitioner.

On August 20, 1965, the petitioner's probation supervisor recommended to the State Department of Public Welfare in Wisconsin that the petitioner's probation be revoked due to his alleged association with known criminals and his alleged involvement in a burglary. On the same day, the district administrator in Wisconsin concurred in the recommendation of revocation. On August 27, 1965, the chief of Probation and Parole Services also concurred in the recommended revocation of the petitioner's probation. On September 1, 1965, an order revoking the petitioner's probation was signed by Wilbur Schmidt, the Director of the Wisconsin State Department of Public Welfare.

On September 3 or 4, 1965, the petitioner was picked up at his place of employment in Illinois and transported to the sheriff's office in Niles, Illinois. Later in the same day, he was transported to the Racine County jail and held overnight. On September 5, 1965, he was transported to and received at the Wisconsin State Reformatory in Green Bay, Wisconsin.

It is undisputed that the petitioner did not at any time receive notice or a hearing of any kind pursuant to the revocation of his probation.

It appears from the record in this case that the petitioner was arrested on August 5, 1965, in Deerfield, Illinois, for burglary. The record also contains in this regard an unsigned statement allegedly given by the petitioner to Robert J. Smart, Assistant State's Attorney, Cook County, Illinois, which, if true and valid, could fairly be construed as a confession to the burglary on August 5, 1965. It further appears from the record that the petitioner was referred to in newspaper articles in the Chicago Tribune concerning the alleged burglary in Deerfield on August 5, 1965.

The petitioner maintains that he is innocent of the burglary charges from Deerfield (which were apparently dropped subsequent to the revocation of his probation) and could have

proven his innocence in court. He contends further that he should have been provided an opportunity to explain and answer the allegations about his involvement in the alleged burglary which he maintains were the basis of the revocation of his probation, but that he was not afforded any hearing in which he could answer the allegations made against him.

At the time of filing his petition for writ of habeas corpus, the petitioner was an inmate in a Wisconsin State correctional institution. However, on June 4, 1969, subsequent to filing the instant writ, the petitioner was released from prison in Wisconsin and was paroled to a federal detainer. The petitioner had previously been sentenced to a term of eight years pursuant to a federal conviction. The petitioner is thus currently a parolee of the State of Wisconsin, incarcerated in a federal prison in Terre Haute, Indiana.

ISSUES

The respondent does not contend that the present petition is moot or that this court lacks jurisdiction to consider it by virtue of the fact that petitioner was paroled from prison in Wisconsin subsequent to filing this petition for writ of habeas corpus. I have concluded that the petition is not moot and that this court has jurisdiction to consider it. The petitioner's parolee status is sufficient "custody" for the purpose of § 2241, et seq., and this court's jurisdiction. The possible adverse effects of the petitioner's probation revocation are sufficiently important "collateral consequences" to save the petition from mootness although the petitioner is no longer technically incarcerated by virtue of the probation revocation. See *Sibron v. New York*, 392 U. S. 40, 50-55 (1968); *Carafas v. LaVallee*, 391 U. S. 235, 237-40 (1968); *Jones v. Cunningham*, 371 U. S. 236 (1963); *Hahn v. Burke*, F. 2d

(No. 17938, Aug. 19, 1970, 7th Cir.); and *Hewett v. North Carolina*, 415 F. 2d 1316, 1320-21 (4th Cir. 1969).

The petitioner's first contention is that the due process clause of the Fourteenth Amendment and the "fundamental principles of liberty and justice" which flow from the due process clause require that a probationer be given notice and hearing prior to the revocation of his probation.

The issue of the necessity of a hearing prior to probation revocation has been the subject of an increasing volume of commentary.[3]

On August 19, 1970, the United States Court of Appeals for the Seventh Circuit decided the case of *Hahn v. Burke*, supra. The *Hahn* case involved an appeal from a district court denial of a petition for writ of habeas corpus. In *Hahn*, one of the petitioner's contentions on appeal was that the revocation of his probation[4] without a hearing violated his constitutional rights.

The Seventh Circuit found that the revocation of the petitioner's probation without affording him a hearing was violative of "the basic requirements of due process." In reaching its decision, the *Hahn* court considered the bases which had been utilized by other courts to reach a contrary conclusion that a hearing before probation revocation was *not* required. Since similar arguments are urged by the respondent in this case, it is worth noting how the *Hahn* court treated these issues. Regarding the "privilege-right" distinction, the Court said:

> "* * * While we are mindful that probation is a privilege and not a right and is subject to the conditions of the court, *see Escoe v. Zerbst*, 295 U. S. 490 (1935), essential procedural due process no longer turns on the distinction between a privilege and a right. *See Goldberg v.*

Kelly, 38 U. S. L. W. 4223, 4225 (May 23, 1970); *Shapiro v. Thompson*, 394 U. S. 618, 627 n. 6 (1969); *Sherbert v. Verner*, 374 U. S. 398 (1963); *Slochower v. Board of Education*, 350 U. S. 551 (1956). *See also* Von Alstyne, *The Demise of the Right–Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1967-8)." Id., at .

With regard to the argument that probation is a form of contract, a condition of which is the waiver of right to a hearing, the *Hahn* Court disagreed saying:

> "* * * Probation is in fact not a contract. The probationer does not enter into the agreement on an equal status with the state. * * *"

The Court then quotes from Judge Celebrezze's dissenting opinion in *Rose v. Haskins*, 388 F. 2d 91, 100 (6th Cir. 1968), wherein Judge Celebrezze stated:

> "* * * if the negative pregnant that is implicit in the contract theory is true (that if the parolee had not agreed to summary revocation he would have had the right to a hearing), then that theory has recognized that a right to a hearing is inherent in the revocation situation. Waiver of such a valuable right is not to be lightly determined, and when the 'choice' of the parolee is to remain in prison or accept such a burdensome provision, the 'choice' to accept parole can hardly be termed a voluntary waiver of the right to a hearing. * * *"

The Court in *Hahn*, in finding that due process dictated a hearing prior to probation revocation, referred to the recent United States Supreme Court case of *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the Supreme Court held that welfare recipients have a constitutional right to a hearing before termination of public assistance benefits. As noted in the *Hahn* opinion, the Supreme Court in *Goldberg* stated at page 262:

"* * * The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring) and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. * * *"

Noting the fact that what was at stake in a probation revocation was a man's liberty, the Seventh Circuit in *Hahn* stated:

"* * * Weighing the 'extent to which he [the petitioner] may be "condemned to grievous loss" ' against 'the governmental interest in summary adjudication' we find the petitioner's loss of freedom to outweigh the added state burden of providing a limited hearing to allow petitioner to be confronted with his probation violation and to be heard.

"The state need not grant probation, but if it does so, it should not be able to arbitrarily revoke such probation without giving petitioner a reasonable opportunity to explain away the accusation that he had violated the conditions upon which his probation was granted. * * * When the state created conditions of probation it impliedly agreed to continue petitioner's probation as long as the conditions were satisfied. To allow the state to summarily revoke the petitioner's probation without a hearing to determine if the conditions upon which the probation was granted have been violated, is state action inconsistent with the due process guarantees of the fourteenth amendment."

The decision in *Hahn v. Burke*, supra, is directly in point and controls decision of the present petition for writ of habeas corpus. The petitioner was entitled to a hearing before the revocation of his probation.[5]

The petitioner in this case has also claimed that the revocation of his probation without a hearing deprived him of equal protection of the laws. He bases this claim on the allegation that probationers in Milwaukee County are afforded a hearing before the sentencing judge prior to revocation, whereas probationers in the rest of the state may be, and are, revoked summarily by the department with no hearing. In light of *Hahn v. Burke*, supra, requiring a hearing prior to revocation of probation, I need not consider the petitioner's equal protection arguments, and I express no opinion as to their merits.

The petitioner in this case further contends that if he is entitled to a hearing prior to revocation of his probation, he is also entitled to the assistance of counsel at that hearing. The court of appeals in *Hahn* did not deal with this issue in its opinion.

In *Mempa v. Rhay*, 389 U. S. 128, 134 (1967), the Supreme Court stated:

> "* * * appointment of counsel for an indigent is required *at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.* * * *" (Emphasis supplied.)

Mempa involved probation revocation proceedings (hearings which were provided for by statute) in the State of Washington. When a criminal defendant in Washington is placed on probation, sentence is deferred; that is, not imposed until such time, if ever, as probation is revoked. Upon revocation, the sentencing judge is required to administer the maximum sentence to the probationer. However, the judge is also free to make recommendations to the prison authorities as to the actual length of time the probationer should serve upon incarceration. The prison authorities are not required to abide by the

judge's recommendations but, as indicated in *Mempa*, probably often do so. It was in this factural context that the Supreme Court in *Mempa* held that counsel was required at the revocation hearing in Washington. The decision of *McConnell v. Rhay*, 393 U. S. 2 (1968), gave *Mempa* retroactive application.

Many courts have held *Mempa* to be restricted to its narrow factual context only. That is, these courts have expressed the opinion that *Mempa* applies only to probation revocation proceedings where deferred sentencing is involved.[6] In my view, *Mempa* should not be read so narrowly.[7] The fundamental premise of *Mempa* is that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." The fact that a previously deferred sentence may be imposed is not the only aspect of probation revocation proceedings which make them a "stage * * * where substantial rights * * * may be affected." Under the state procedure involved in *Mempa*, the previously deferred sentence was imposed only if the outcome of the revocation hearing was that conditions of probation had, in fact, been violated and that, consequently, probation should be revoked. In this connection, there is language in *Mempa* wherein the Supreme Court expresses concern about the nature of the proceeding leading to the decision of whether to revoke probation or not. After noting that appeal in a case involving a guilty plea followed by probation can only be taken after sentence is imposed following revocation, and noting that a plea of guilty may be withdrawn at any time prior to imposition of sentence, the Supreme Court said:

> "The two foregoing factors assume increased significance when it is considered that, as happened in these two cases, *the eventual imposition of sentence* on the prior plea of guilty *is based on the alleged commission of offenses for which the accused is never tried.*" (Emphasis supplied.) Id, at 136-7.

[In *Mempa*, as in the present case, probation was revoked on the basis of *allegations* that the petitioners had committed new offenses.] Substantial rights were potentially affected in *Mempa* not only because of the possibility that sentence would be imposed, but also because the threshold determination as to whether probation should be revoked is often based upon mere allegations of misconduct. I believe that the Supreme Court, through its broad statement about the necessity of counsel at "every stage * * * where substantial rights * * * may be affected," was expressing its concern in *Mempa* for the total nature of the proceeding, not only the sentencing dimension (admittedly the prime emphasis) but also the fact that "the eventual imposition of sentence * * * is based on the alleged commission of offenses for which the accused is never tried."

In Wisconsin, sentence is not legally deferred when a defendant is placed on probation. But in fact, the sentence only becomes effective when probation is revoked. In practice, the distinction between the Wisconsin and Washington procedures is one of form more than one of substance. It is indisputable that "substantial rights" of the probationer are involved at a probation revocation hearing. The probationer's liberty hinges on the outcome of the hearing.

In *Hewett v. North Carolina*, 415 F. 2d 1316 (4th Cir. 1970), the Fourth Circuit Court of Appeals dealt with the issue of counsel at a probation revocation hearing. In North Carolina, a hearing upon revocation of probation was provided for by statute. As in Wisconsin, this hearing did not involve deferred sentencing. Referring to *Mempa v. Rhay*, supra, the *Hewett* Court stated at page 1322:

> "As we read *Mempa* we are persuaded, unlike the majority of the decisions which deny the right to counsel, that it cannot be limited to its narrow factual context. The

principle which undergirds that decision is broad indeed, 'appointment of counsel for an indigent is required at *every stage* of a criminal proceeding where *substantial rights* of a criminal accused may be affected.' * * * While the right to counsel applies to 'criminal proceedings,' we have little doubt that the revocation of probation is a stage of criminal proceedings. Even if a new sentence is not imposed, it is the event which makes operative the loss of liberty. * * *"

The *Hewett* Court concluded that counsel was required at probation revocation hearings in North Carolina even though deferred sentencing was not involved.

The respondent in this case maintains that there is no right to the assistance of counsel and relies for that contention on *Brown v. Warden, U. S. Penitentiary,* 351 F. 2d 564 (7th Cir. 1965). In *Brown,* the Seventh Circuit dealt with the issue of counsel at a federal probation revocation hearing and found that in that case counsel was not required. The *Brown* case dealt with federal probation and involved a situation wherein the probationer had been *convicted* of a new offense before the revocation hearing. The court stressed the fact that the petitioner in *Brown* had not requested the assistance of counsel and did not deny the violation of his probation conditions. More importantly, however, since *Brown* was decided, the decisions in *Mempa* and *Hahn* have intervened. The *Brown* court relied heavily on the privilege-right distinction and referred in that regard to *Escoe v. Zerbst,* supra. In *Hahn,* the Seventh Circuit stated that the privilege-right dicta from *Escoe* had "all but been obliterated" by recent United States Supreme Court opinions. In my view, the Supreme Court holding in *Mempa* with regard to the necessity of counsel at "every stage" of a criminal proceeding where "substantial rights" may be affected, and the *Hahn* decision taken as a whole, undercut the basis of the holding in *Brown*

sufficiently so that it need not be viewed as controlling the decision of the present issue.[8]

I find the probation revocation hearings in Wisconsin, provided for in *Hahn v. Burke*, supra, to be proceedings where "substantial rights" are unquestionably affected. Therefore, I find that the assistance of counsel is required at these hearings.

Finally, there is the question of what *type* of hearing is required. The court in *Hahn* held that "fundamental constitutional requirements of due process necessitate a *limited* hearing prior to a probation revocation." (Emphasis supplied.) The court then stated in a footnote:

> "[8]This is not to deny that probationers could not be detained where circumstances required and a hearing was not immediately possible. We need not now explore the specific procedural characteristics which revocation must have."

The court then concluded its opinion by stating:

> "For the foregoing reasons, we hold petitioner's probation revocation to be a nullity and therefore reverse and remand to the district court with directions to expunge the revocation from petitioner's record. The Wisconsin court may, however, hold a probation revocation hearing at this time if it has jurisdiction over probationer."

The quotation above, referring to "The Wisconsin court," is an indication that *Hahn* court was requiring judicial hearings prior to revocation. However, this reference is the only mention made in the opinion in this regard. The issue of whether hearings prior to probation revocation in Wisconsin should be administrative or judicial has not been an issue in this case. I do not now attempt to decide the issue of the precise character and form of the hearings

now required in Wisconsin beyond what is indicated by the opinion in *Hahn v. Burke*.

The foregoing opinion constitutes this court's findings of fact and conclusions of law in accordance with Rule 52 (a) of the Federal Rules of Civil Procedure.

For the purpose of the present petition for writ of habeas corpus,

IT IS ORDERED:

1. That petitioner's probation revocation be and it hereby is adjudged to be a nullity, and respondent is directed to expunge it from the petitioner's records.

2. That the application for writ of habeas corpus be granted, and that the issuance of the writ be stayed for a period of thirty days from the date of this order to enable the Wisconsin court to hold a hearing on petitioner's probation revocation, if it so desires. If a hearing is held, the petitioner is entitled to the assistance of counsel. If such a hearing is not held within the designated time, the writ will be issued.

Dated at Milwaukee, Wisconsin, this *21st* day of September, 1970.

John W. Reynolds
U.S. District Judge

FOOTNOTES

1. See Wisconsin Statutes, § 57.01, et seq.

2. See Wisconsin Statutes, § 57.13.

3. See Cohen, *Sentencing, Probation and the Rehabilitative Ideal; The View from Mempa v. Rhay*, 47 Tex. L. Rev. 1 (1968); Bassett, *Discretionary Power and Procedural Rights in the Granting and Revoking of Probation*, Journal of Crim. Law, Crim. & Pol. Sci., Vol. 80, No. 4, Pg. 479 (1969); Benjamin, *Due Process and Revocation of Conditional Liberty*, 12 Wayne L. Rev. 638 (1966); Comment: *Right to Counsel-State Courts Split on Probationer's Right to Counsel at Revocation Hearing*, 42 N.Y.U.L. Rev. 955 (1967); Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 Jour. Crim. Law, Crim. & Pol. Sci. 175 (1964); Note, *Legal Aspects of Probation Revocation*, 59 Colum. L. Rev. 311 (1959). See also: *Federal Rules of Criminal Procedure*, Rule 33 (f), providing for hearing in federal probation revocation; *Report of the President's Commission on Law Enforcement and the Administration of Justice*—Task Force Report: *Corrections*, page 88, calling for hearing and the appointment of counsel for probation revocation; *ALI Model Penal Code*, § 301.4 (1962), calling for notice and hearing before revocation; *ABA Standards for the Administration of Criminal Justice*, § 5.4, 7 CrL 3079 and 7 CrL 2418; *Study Draft of New Federal Criminal Code*, June 8, 1970, § 3104 (2) at 277-78.

4. Wisconsin Statutes, § 57.03 (1), provides for the revocation of probation without a hearing in that the department is empowered, where the probationer has already been sentenced, to transport him directly to prison.

5. See also *Marquardt v. Gagnon* (No. 70-C-67, E.D. Wis., August 31, 1970).

6. *Bishop v. Brierly*, 288 F. Supp. 401 (E.D. Pa. 1968); *Holder v. United States*, 285 F. Supp. 380 (E.D. Tex. 1968); *Sammons v. United States*, 285 F. Supp. 100 (S.D. Tex. 1968); *United States v. Hartsell*, 277 F. Supp. 993 (E.D. Tenn. 1967); *Trautsch v. Gagnon* (No. 68-C-108, W.D. Wis. 1968—unpublished opinion).

7. For other cases holding or suggesting that *Mempa* applies to probation revocation proceedings even in the absence of deferred sentencing, see *Hewett v. North Carolina*, 415 F. 2d 1316 (4th Cir. 1969); *Ashworth v. United States*, 391 F. 2d 245 (6th Cir. 1968); *Peinado v. Adult Authority of Department of Corrections*, 405 F. 2d 1185 (9th Cir. 1969); *Shone v. State of Maine*, 406 F. 2d 844, at n. 13 (1st Cir. 1969); *State v. Seymour*, 237 A. 2d 900 (N.J. App. Div. 1968); *Commonwealth v. Tenson*, 4 CrL 2351 (Pa. S.Ct. Jan. 15, 1969).

8. See also *Ashworth v. United States*, 391 F. 2d 245 (6th Cir. 1968).

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

No. 18523 JAMES C. GUNSOLUS, *Petitioner-Appellant,* v. JOHN R. GAGNON, Warden, *Respondent-Appellee.*	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 69-C-617 ROBERT E. TEHAN, *Judge.*
Nos. 18501, 18502 VERN LEVI FINK and THOMAS F. HOPPE, *Petitioners-Appellants,* v. ELMER O. CADY, Warden, *Respondent-Appellee.*	Appeal from the United States District Court for the Eastern District of Wisconsin. Nos. 69-C-547 & 69-C-606 KENNETH P. GRUBB, *Judge.*
No. 18875 GERALD H. SCARPELLI, *Petitioner-Appellee,* v. JOHN R. GAGNON, Warden, *Respondent-Appellant.*	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 68-C-387 JOHN W. REYNOLDS, *Judge.*

December 28, 1971

Before FAIRCHILD and SPRECHER, *Circuit Judges*, and CAMPBELL, *Senior District Judge.*[1]

[1] Honorable William J. Campbell, Senior District Judge, Northern District of Illinois, is sitting by designation.

FAIRCHILD, *Circuit Judge.* These consolidated appeals raise several questions of importance concerning the probation revocation process in Wisconsin. In *Hahn* v. *Burke*, 430 F2d 100 (7th Cir., 1970), cert. den. 402 U.S. 933, this court held that "basic requirements of due process entitle a probationer to a hearing before his probation is revoked." These appeals present the related issues of (1) whether *Hahn* should be applied retroactively, (2) whether the probation revocation hearing must be judicial, or whether an administrative hearing will suffice, (3) whether retained counsel must be allowed to participate in the probation revocation hearing, and (4) whether indigents are entitled to the appointment of counsel to assist them at the hearing.

The basic factual pattern with respect to all four petitioners involved in the instant appeals is as follows: Petitioners were convicted of felonies in various Wisconsin courts outside of Milwaukee county and sentenced to terms of imprisonment. Execution of sentence was stayed and petitioners placed on probation in the custody of the Wisconsin Department of Health and Social Services. Each petitioner was alleged later to have committed some act or acts which violated a condition of his probation. Thereupon, the department revoked probation and petitioners were incarcerated to serve the full term of the sentence previously imposed. No hearing was conducted for any petitioner before probation was revoked. Revocation of probation with respect to all petitioners occurred prior to our ruling in *Hahn*. Each petitioner exhausted his state habeas corpus remedies and then sought federal habeas corpus. Each federal petition was filed prior to our ruling in *Hahn*. The district court denied the petitions of petitioners Fink, Hoppe, and Gunsolus in orders which pre-dated *Hahn*. In the case of Scarpelli, the district court ruled, after our decision in *Hahn*, that petitioner was entitled to a hearing prior to probation revocation and entitled to appointment of counsel for such hearing. The district court opinion is reported at 317 FSupp. 72 (E.D. Wis., 1970).

Nos. 18501 and 18502, Fink and Hoppe

In April, 1969 petitioners Fink and Hoppe were convicted of burglary and sentenced to indeterminate terms

of not more than 4 and 3 years respectively. Execution of sentence was stayed and petitioners placed on probation to the department. As one condition of probation, each petitioner was to remain in the custody of the sheriff for one year during the time he was not employed. During this year, the department decided that each had violated this condition by absenting himself from jail "under deceptive and improper circumstances." Thereupon the department revoked probation.

No. 18523, Gunsolus.

Petitioner Gunsolus was convicted of theft and sentenced to a term of not more than 3 years imprisonment. Execution of the sentence was stayed and petitioner placed on probation for a period of 2 years, upon the condition, inter alia, that he spend his non-working hours in jail for the first six months. During this period the department decided that petitioner had absconded, and revoked probation.

No. 18875, Scarpelli.

In July, 1965 petitioner Scarpelli was convicted of armed robbery and sentenced to imprisonment for an indeterminate term not to exceed 15 years. Execution of the sentence was stayed and petitioner placed on probation for a period of 7 years. In September, 1965, the department decided that he had associated with known criminals and had been involved in a burglary. The department revoked probation. At the time of the filing of his petition for writ of habeas corpus, petitioner was incarcerated in a Wisconsin prison. On June 4, 1969 petitioner was paroled to a federal detainer. Petitioner is thus currently a parolee of the state of Wisconsin incarcerated in a federal prison. We agree with the district court that petitioner's parole does not moot this petition.

Retroactivity of Hahn v. *Burke.*

In *Hahn* v. *Burke* we held that constitutional dictates of due process require a state to hold a hearing before revoking probation. The state urges us to limit the effect of this holding to only those probation revocations which occur after the date of *Hahn*, August 19, 1970.

In *Stovall* v. *Denno*[3], the Supreme Court listed the criteria for determining the extent to which changed interpretations of the constitution with respect to criminal procedure should be applied retroactively. They are as follows: "(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of the new standards."

Although *Mempa* v. *Rhay*[4] requiring that counsel be made available at a revocation hearing which culminates in sentencing has been given full retroactive application[5] it does not necessarily follow that the *Hahn* requirement of a revocation hearing where revocation terminates the stay of a sentence already imposed must be retroactively applied.

On April 2, 1971, the Supreme Court of Wisconsin decided *State ex rel. Johnson* v. *Cady*[6], and held that there is a right to a hearing on revocation of probation (and of parole as well). On the question of retroactivity, the Court evaluated the situation in terms of *Stovall* criteria, and determined "that the hearing granted by this decision shall be prospective only except as to those petitions on file in this court or any trial court in the state as of the date of this mandate."[7] We understand "on file" to mean pending, and to exclude petitions previously filed, denied, and beyond direct review. If we misconstrue the phrase, then present petitioners, who presented petitions to state courts long ago, would only have to go back to state court to receive the benefit of *Johnson*.

We are not prepared to disagree with the evaluation by the Wisconsin Court of the various factors, leading to its conclusion that full retroactivity for *Hahn* is inappropriate. If we were so to decide similarly, the normal pattern would be to limit the *Hahn* decision to prospective effect except that it would be applied to Hahn himself. It is the doctrine of *Stovall*, p. 301, that if full retro-

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[3] 388 U.S. 293, 297 (1967).
[4] 389 U.S. 128 (1967).
[5] *McConnell* v. *Rhay*, 393 U.S. 2 (1968).
[6] 50 Wis2d 540, 185 NW2d 306.
[7] 50 Wis2d 558.

activity be deemed inappropriate, the arguable inequity, to other petitioners similarly situated, of applying the new rule to the party in the case in which the new rule is announced, and the fact that he is a chance beneficiary of the new rule, are not adequate reasons for applying the new rule retroactively to all who have already brought their cases to court.

Our present situation has, however, unusual elements. The dates of the *Hahn* and *Johnson* decisions, rejecting ex parte revocations of probation, are different. *Johnson* is to be applied retroactively to a limited class of persons other than the *Johnson* petitioners in order to avoid inequity to that class. And those who properly raise the challenge in federal courts necessarily have previously pursued it in state courts.

We do not attempt to pose and analyze all the hypothetical situations in which a purely prospective *Hahn*, side by side with a limited retroactivity for *Johnson*, would cause some degree of inequity. There would exist one glaring inequity, however, among Wisconsin prisoners whose probation was revoked ex parte before the date of *Hahn*. Those whose state court petitions were still pending by the date of *Johnson*, either because filed later, perhaps relying on *Hahn*, or because more slowly processed, would get the benefit of the new rule by virtue of *Johnson's* retroactivity formula. Those who filed in state court earlier and whose petitions were denied more promptly, and who brought their claim to the federal district court before the date of *Hahn*, would not, except for Hahn himself, get such benefit.

We think that under the facts peculiar to this case, *Stovall* does not prevent our considering the inequity just referred to, and making *Hahn* retroactive to the limited extent necessary to avoid it. Therefore we hold that *Hahn* is retroactive at least so as to apply to all who, having exhausted state remedies, had filed petitions in federal district court before August 19, 1970 raising the claim here involved, which petitions had not been denied, or if denied, were still open to direct review. *Hahn* would thus be applied to petitioners in this case. Whether there is sound reason for according full retro-

activity to *Hahn* would better be considered when the facts presented make it necessary squarely to face and decide the question.

Whether the revocation hearing may be administrative rather than judicial.

As to all courts in Wisconsin except those in Milwaukee county, the statutes provide that a person placed on probation shall be in the custody of the state's department of health and social services.[7] It is the department, rather than the court, which revokes probation for violation of a condition. In cases like petitioners', where the court has already imposed sentence, the department orders the probationer to prison and his sentence begins. In cases where the court has withheld sentence, the department orders him brought before the court for sentencing.[8] In counties exceeding 500,000 population, *i.e.*, Milwaukee, the statutes provide that the probation department of the respective court shall have custody of probationers, and "Probation violators whether sentenced or not, shall be taken before the court for a hearing."[9]

Thus the finding that a violation had occurred and the decision that probation be revoked was made by an administrative officer in petitioners' cases. *Hahn* has already decided that these administrative decisions were invalid because of lack of hearing. We understand that in revocations since *Hahn*, the department has continued to make the decisions in cases where probationers are in its custody, as the statute requires, except that a hearing is now held (though counsel is excluded). The question will now arise in the present cases whether, if the revocation proceeding is to be revived, an administrative hearing, fulfilling due process standards, will suffice. Petitioners contend that an administrative hearing and determination on the question of revocation is either inadequate, as a matter of due process, or in any event a denial of equal protection of the laws, since persons placed on probation by Milwaukee courts are given a judicial hearing.

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[7] §973.09, Wis. Stats.
[8] §973.10, Wis. Stats.
[9] §973.11(5), Wis. Stats.

In *Hahn*, the decision to revoke was also administrative, but these issues seem not to have been raised, and were not discussed in the opinion. We conclude that no answer to these questions was implied by the reference in the last sentence of the *Hahn* opinion to "court" rather than "department."

Assuming that the department follows a hearing procedure which otherwise fulfills due process standards (and, as will be seen, we think counsel is required), we think there is no reason to fault it because carried out by administrative personnel rather than by a judge. And we find no other constitutional provision which expressly or by implication requires that revocation of probation be accomplished within the judicial department.

Petitioners' equal protection claim rests upon the proposition that classification of probationers according to the population of the county in which the convicting court sits can not be sustained where members of one class charged with violation receive a hearing before a judge and members of the other a hearing before an administrative officer. The Supreme Court of Wisconsin has decided that territorial uniformity is not required and that this difference in procedure does not deny equal protection.[10] We agree that the basis of the classification is not inherently invidious.

Moreover, considering the cases, like petitioners', where sentence has already been imposed, it does not appear that the courts in Milwaukee county have power to act in significant ways beneficial to alleged probation violators which the department lacks. The statutes do not expressly authorize the courts to reduce previously imposed sentences in connection with revocation of probation. If, indeed, the courts in Milwaukee county make a practice of doing so, no showing of that fact has been presented.

Any court which has placed a defendant on probation may at any time prior to the expiration of the probation period extend the period of the probation or modify its terms and conditions.[11] Any court which has imposed a

[10] *Johnson, supra*, note 5, 50 Wis2d 553.

[11] Sec. 973.09(3), Wis. Stats.

sentence may modify it upon motion made within ninety days.[13] The fact that a court in Milwaukee county might employ either of these powers in connection with a proceeding to revoke probation, while the department could do no more than recommend such action to the court of conviction, if located elsewhere, does not, in our opinion, raise a sufficient difference so that probationers are denied equal protection.

Presence of retained counsel.

We have no difficulty in recognizing the significance of the probationer's stake in a revocation hearing, such that counsel obtained by the probationer must be admitted to the hearing and permitted to represent his client.[15]

Right to counsel, furnished if necessary.

Petitioners contend, and the district court in *Scarpelli*[14] held that indigent probationers are entitled to the appointment of counsel to assist them at probation revocation.

The district court relied on *Mempa* v. *Rhay*,[16] adopting the view that when sentence is imposed, as well as when imposition is stayed, and defendant is placed on probation, the criminal proceeding extends beyond sentencing into the probationary period so that a proceeding to revoke probation is still a stage of it, and a stage, of course, where substantial rights may be affected. The same interpretation of *Mempa* was stated in *Hewett* v. *State of North Carolina* on the ground that "[e]ven if a new sentence is not imposed, [revocation] is the event which makes operative the loss of liberty."[16] The Court of Appeals of New York has said that "[t]he principle which underlies the decision in *Mempa* is sufficiently broad to encompass the revocation of parole as well as of probation."[17]

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[13] *Hayes* v. *State*, 46 Wis2d 93 (1971).

[14] *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970).

[14] *Scarpelli* v. *Gagnon*, 317 FSupp. 72 (E.D.Wis., 1970).

[15] 389 U.S. 128 (1967).

[16] 415 F2d 1216, 1222 (4th Cir., 1969).

[17] *People ex rel. Menechino* v. *Warden, Green Haven St. Pris.*, 27 NY2d 376, 267 NE2d 238, 241 (1971).

With all respect[18] it seems to us that the rationale stated by the Supreme Court for its result in *Mempa* should be considered in deciding how far *Mempa* reaches. It seems to us that the Court quite carefully limited its application of a sixth amendment right to counsel at revocation of probation to a situation in which the criminal proceeding by reason of the deferment of sentencing could logically be deemed incomplete, and in which the imposition of sentence, coupled with revocation, could readily be said to be a stage of such proceeding. Almost a year after *Mempa*, in deciding that *Mempa* has full retroactive effect, the Court referred to it as deciding that sixth amendment rights had been violated at "deferred sentencing hearings", and twice characterized the right involved as "[t]he right to counsel at sentencing."[19] Surely a probation revocation proceeding affects substantial rights of a probationer even where the sentence has already been imposed, but we do not think that *Mempa*, with its emphasis on sentencing, held that every probation revocation is a stage of a criminal proceeding nor that, for this purpose, the entire range of the correctional process after sentencing is a part of the criminal proceeding.

In *Hahn*, sentence had been imposed at the time Hahn was placed on probation. This court, in deciding that Hahn's probation could not constitutionally be revoked without a hearing did not rely on *Mempa* nor say that the revocation was a stage of the criminal proceeding. Rather it concluded that the loss of the freedom (albeit somewhat restricted) enjoyed by a probationer was grievous, and, after weighing it against the governmental interest involved, "that fundamental constitutional requirements of due process necessitate a limited hearing prior to a probation revocation."[20] We think the same due process requirements lead to the conclusion that counsel must be made available.[21]

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[18] Opinions variously construing *Mempa* have been most recently collated in Dyke, "Parole Revocation Hearings in California: The Right to Counsel," 59 Cal.L. Rev. 1215 (1971).

[19] *McConnell*, *supra*, note 4.

[20] 430 F2d 105.

[21] Decisions dealing with parole revocations and reaching a similar conclusion in that setting are: *People ex rel. Menechino* v. *Warden, Green Haven St. Pris.*, *supra*, note 17, 267 NE2d 242; *United States ex*

The Supreme Court has, at least twice, decided that in proceedings where personal liberty is at stake, but which do not, or may not, constitute criminal proceedings, the due process clause of the fourteenth amendment compels the state to make counsel available. *In re Gault*, 387 U.S. 1, 41 (1967), a proceeding to determine delinquency of a child. *Specht* v. *Patterson*, 386 U.S. 604, 608 (1967), a proceeding under a sex offenders act "whether denominated civil or criminal."

The vast importance of revocation to the probationer is clear. It is immediately measured by the difference between confinement in an institution and freedom to live a normal life, though restricted in some degree by conditions of probation. As pointed out in *Hahn*, p. 102, it affixes a permanent blemish to his record. Whether assistance of counsel at the revocation proceeding is essential to fundamental fairness turns on the function counsel may be expected to perform. Granting that the scope of the revocation hearing is limited and that the procedure need not be formal, the ability of counsel to direct, amplify, and promote the flow of information is nevertheless of real significance.

Violation of a condition of probation is prerequisite to revocation. Thus there is likely to be an issue of fact, in the just determination of which counsel can afford help.[22] Development of other information, bearing upon the exercise of discretion whether to revoke or merely warn for proved misconduct, would usually be an important role for counsel.

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[21] (Continued)
rel. *Bey* v. *Connecticut State Bd. of Par.*, 443 F2d 1079 (2d Cir., 1971), judgment vacated and cause remanded for dismissal as moot, 40 L.W. 3181; *Warren* v. *Michigan Parole Board*, 23 Mich. App. 754, 179 NW2d 664 (1970); *Goolsby* v. *Gagnon*, 322 FSupp. 460, 466 (E.D.Wis., 1971). Contra: *Bearden* v. *South Carolina*, 443 F2d 1090, 1093 (4th Cir., 1971); *Morrissey* v. *Brewer*, 443 F2d 942, 950 (8th Cir., 1971); *In re Tucker*, 95 Cal. Rptr. 761, 488 P2d 657 (1971).

[22] "The probation revocation proceeding, in other words, involves exactly the same kind of problem as is involved in the criminal trial itself . . . the ascertainment of historical events about which there may be some dispute and the consideration of those events against a standard of conduct to which the probationer is expected to adhere. The inability of the lay-probationer to adequately protect himself in such a context would seem just as pronounced as it is at the trial itself." A.B.A. Standards, "Probation," Tentative Draft, p. 69.

Recognizing the potential issues of fact and the scope of facts in mitigation or otherwise influential in a favorable exercise of discretion, we think that in order for the hearing, found necessary in *Hahn*, to be meaningful, the assistance of counsel must be available. As stated by the Supreme Court in *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932), "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."

Brown v. *Warden, U.S. Penitentiary*[33] is a 1965 decision of this court, holding that counsel need not be afforded at a probation revocation hearing in a federal court. *Brown* preceded many of the recent cases involving this subject. Since a hearing had been afforded, *Brown* was not concerned with the question whether a hearing was constitutionally required. The sentence had already been imposed, and we do not, under our view of *Mempa*, find that *Brown* was overruled by *Mempa*. Because, however, we conclude that counsel was required in order to fulfill due process, we now overrule *Brown* insofar as it holds the contrary.[34]

In No. 18875, *Scarpelli*, the judgment is affirmed. In Nos. 18501, *Fink*, 18502, *Hoppe*, and 18523, *Gunsolus*, the judgments are reversed and the causes remanded to the district court with directions to order release from confinement and reinstatement of probation unless, within a short but reasonable interval, to be fixed by the district court, a new revocation is ordered, after a hearing consistent with this opinion.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

[33] 351 F2d 564 (1965).

[34] This opinion has been circulated among all the judges of this court in regular active service, and a majority has voted not to rehear in banc the question of overruling *Brown*.

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1225

JOHN R. GAGNON, Warden,
Petitioner,

- v. -

GERALD H. SCARPELLI,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1971

No. 71-1225

JOHN R. GAGNON, Warden,
Petitioner,

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court below (Ap. 36) is reported *sub nom. Gunsolus v. Gagnon,* 454 F. 2d 416. The opinion of the district court (Ap. 36) is reported *sub nom. Scarpelli v. Gagnon* (E.D. Wis., 1970), 317 F. Supp. 72.

JURISDICTION

The judgment of the Court of Appeals was entered December 28, 1971 (Ap. 36). Petition for certiorari was filed March 25, 1972, and certiorari was granted June 26, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a person convicted and sentenced by a state court with execution stayed, placed on probation in custody of a state agency, independent of the court, having sole authority to revoke his probation and execute the sentence, has a Fourteenth Amendment due process right to a hearing with assistance of counsel on whether grounds exist to revoke his probation.

The Court of Appeals held in the affirmative.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the United States Constitution

Section 1: "* * * [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Laws of 1907, Chapter 110

Parole of state prisoners: Section 4960c—1. The board of control is hereby given authority to issue a parole to any prisoner, with the approval of the governor, who is now or may hereafter be imprisoned in the state prison subject to limitations herein contained.

Legal control; monthly report. Section 4960c—3. All persons while on parole under the provisions of this act shall *remain in the legal custody and under the control of the state board of control and subject at any time to be taken back within said prison.* The board of control shall require monthly reports to be made by said paroled person and in addition thereto shall require monthly reports from the person in whose employment said convict may be at any time.

Re-imprisonment. Section 4960c—5. *Full power to take and re-imprison any paroled convict is hereby conferred upon said board of control* whose written order shall be sufficient warrant for any officer to take and return to the custody of the institution from which he has been paroled and all officers shall execute such order in the same manner as a warrant for arrest.

Laws of 1909, Chapter 541

Section 4734a. In all prosecutions for crime, except as hereinafter provided, where the defendant has been convicted either upon a trial or upon his plea, where the court has power to sentence such defendant to the Wisconsin State Prison or to the Wisconsin State Reformatory, any workhouse, house of correction or other correctional institution in cases in which the minimum penalty is one year or more, and it appears that the defendant has never before been convicted of a felony or misdemeanor, either in

this state or elsewhere * * * and where it appears to the satisfaction of the court that the character of the defendant and the circumstances of the case are such that he is not likely to again engage in an offensive course of conduct, and where it appears that the public good does not demand or require that the defendant shall suffer the penalty provided by law, said court may suspend the sentence or stay the execution thereof and place the defendant on probation in the manner hereinafter provided, giving his reasons therefor, which shall be made a part of the record.

* * *

Section 4734c. Whenever the defendant has been placed on probation under this act the effect of such order of probation shall be to *place said defendant under the control and management of the state board of control of Wisconsin* reformatory, charitable and penal institutions, and *he shall be subject to the same rules and regulations as apply to persons paroled from* said institutions after a period of imprisonment therein.

Section 4734g. Whenever it appears to the state board of control that a person placed upon probation as aforesaid does not conduct himself in accordance with the rules and regulations of the board of control with reference to persons paroled by them, a field officer representing the state board of control may upon its order without warrant or other process arrest said person, and either bring him before the court for sentence upon his former conviction, which shall then be imposed and not stayed by the court, or if sentenced to any penal institution, convey him to said institution, and the board of control may *after a full investigation and personal hearing* because of such conduct *forthwith terminate the probation and cause said person to suffer the penalty of the sentence imposed.* Any person under probation who has violated the conditions of his probation shall under order of the board of control be subject to arrest in the same manner as in the case of an escaped convict. In all cases of such termination of probation

the original sentence shall be considered as beginning upon the first day of imprisonment in the institution to which he is sentenced, and no period of probation shall be deducted therefrom.

Wisconsin Statutes 1945, 57.03 (1)

57.03 Recommitment on violation of probation; discharge. (1) Whenever it appears to the state department of public welfare that any such probationer in its charge has violated the regulations or conditions of his probation, the said department may, *upon full investigation and personal hearing,* order him to be brought before the court for sentence upon his former conviction, which shall then be imposed without further stay, or if already sentenced to any penal institution, may order him to be imprisoned in said institution, and the term of said sentence shall be deemed to have begun at the date of his first detention at such institution. A copy of the order of the department shall be sufficient authority for the officer executing it to take and convey such probationer to the court or to the prison; but any such officer may, without order or warrant, whenever it appears to him necessary in order to prevent escape or enforce discipline, take and detain the probationer and bring him before the board for its action.

Laws of 1947, Chapter 477

Section 5. 57.03 is revised to read:

57.03 RETURN TO COURT; DISCHARGE. (1) If a probationer in its charge violates the conditions of his probation, the department may order him brought before the court for sentence which shall then be imposed or if already sentenced may order him to prison; and the term of sentence shall begin on the date he enters the prison. A copy of the order of the department shall be sufficient authority for the officer executing it to take the probationer to court or to prison.

* * * *

Wisconsin Statutes 1967, 57.01 (1), 57.02 and 57.03 (1)

57.01 Probation of felons. (1) When a person is convicted of a felony (convictions under s. 52.05 excepted) and it appears to the court from his character and the circumstances of the case that he is not likely again to commit crime and that the public welfare does not require that he shall suffer the penalty of the law, the court may, by order, withhold sentence or impose sentence and stay its execution and in either case place him on probation to the department for a stated period, stating in the order the reasons therefor, and may impose as a condition of such order or of continuing it in effect that he shall make restitution or pay the costs of prosecution or do both. The period of probation may be made consecutive to a sentence of imprisonment on a different charge, whether imposed at the same time or previously. Consecutive periods of probation may be imposed. In case the conditions of probation are violated, the current probation and all subsequent consecutive probations shall be revoked.

57.02 Control of probationer. Except as provided otherwise in section 57.025, *every probationer in the custody of the department shall be subject to the control of the department under regulations applicable to paroled persons.* Upon the entry of the order of probation the court or the clerk of the court shall deliver a certified copy of the record in the case to the department, whereupon the custody of the probationer vests in the department.

57.03 Return to court; discharge. (1) If a probationer in its charge violates the conditions of his probation, the department may order him brought before the court for sentence which shall then be imposed without further stay or if already sentenced may order him to prison; and the term of sentence shall begin on the date he enters the prison. A copy of the order of the department shall be sufficient authority for the officer executing it to take the probationer to court or to prison.

Wisconsin Statutes 1967, 57.06

57.06 Paroles from state prisons and house of correction. (1) (a) The department may parole an inmate of the Wisconsin state prisons or any felon or any person serving at least one year or more in the Milwaukee county house of correction or a county reforestation camp organized under s. 56.07, when he has served the minimum term prescribed by statute for the offense (which shall be one year unless a greater minimum is prescribed by the statute defining the crime) or one-half of the maximum of an indeterminate term or 2 years, whichever is least, or when he has served 20 years of a life term, less the deduction earned for good conduct as provided in s. 53.11. The district attorney and judge who tried the inmate shall be notified in writing at least 10 days before the first application for parole is acted upon and if they so request shall be given like notice of each subsequent application.

* * *

(3) *Every paroled prisoner remains in the legal custody of the department* unless otherwise provided by the department. *All prisoners under its custody may be returned to prison at any time,* on the order of the department, and shall be returned whenever found exhibited in any show. A certified copy of the order shall be sufficient authority for any officer to take the prisoner to the prison designated by the department. The officer shall execute such order as a warrant for arrest but any officer may, without order or warrant, take the prisoner into custody whenever necessary in order to prevent escape or enforce discipline or for violation of parole.

Wisconsin Statutes 1967, 57.072

57.072 Period of probation or parole tolled. The period of probation or parole ceases running upon the offender's absconding or committing a crime or some other violation of the terms of his probation or parole which is sufficient in the opinion of the court or the department to warrant revocation of probation or parole. It remains tolled until the

happening of one of the following events: *** in cases supervised by the department, *reinstatement of the offender's parole or probation by order of the department;* ***.

Wisconsin Statutes 1967, 57.13

57.13 Out-of-state parolee supervision; state compacts. The governor of this state is authorized and directed to enter into a compact on behalf of this state with any state of the United States legally joining therein in the form substantially as follows:

A COMPACT

Entered into by and among the contracting states, signatories hereto, with the consent of the congress of the United States of America, granted by an act entitled "An act granting the consent of congress to any two or more states to enter into agreements or compacts for co-operative effort and mutual assistance in the prevention of crime and for other purposes".

The contracting states solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this contract (herein called "sending state") to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called "receiving state") while on probation or parole, if

(a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there; or

(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

(c) Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

(d) A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than 6 continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That the duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all such states parties to this compact, without interference.

(5) That the governor of each state may designate an officer who, acting jointly with like officers of other

contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its ratification by any state as between it and any other state or states so ratifying. When ratified it shall have the full force and effect of law within such state, the form of ratification to be in accordance with the laws of the ratifying state.

(7) That this compact shall continue in force and remain binding upon such ratifying state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal or until finally discharged by the sending state. Renunciation of this compact shall be by the same authority which ratified it, by sending 6 months' notice in writing of its intention to withdraw the compact to the other states party thereto.

(9) This section may be cited as the "Uniform Act for Out-of-State Parolee Supervision".

STATEMENT OF FACTS

A. Facts of the Case

On July 9, 1965, Gerald Scarpelli was convicted in Wisconsin of armed robbery and received a 15 year prison term, execution of which was stayed and he was placed on probation for 7 years in the custody of the State Department of Public Welfare/[1] (App. 6, 9, 11). On the same day he signed the parole agreement by which he agreed among other things to make a sincere attempt to avoid illegal acts; to conduct himself honestly; to keep his probation agent informed of his

/[1] Now Department of Health and Social Services.

whereabouts and activities at all times; to submit such reports as may be required; to secure advance approval to leave the state; and if he proved himself unsuited to supervision, to hold himself ready to be placed in the institution to which he was committed. (App. 6, 12-13). He was also granted and accepted a travel permit authorizing him to go to Oak Park, Illinois, to reside at home until probation supervision could be transferred to Illinois, in which he agreed among other things to return to Wisconsin and report to his agent when instructed by the Department, and waived extradition to Wisconsin (App. 6, 15).

On August 5, 1965, he was accepted for supervision by the Adult Probation Department of Cook County pursuant to the Interstate Compact for Out-of-State Parolee Supervision, by a letter specifying that he resided in Oak Park, Illinois, and was employed in Glenview, Illinois (App. 6, 17). Oak Park is adjacent to Chicago on the west and Glenview is approximately 13 miles north of Oak Park and approximately 6 miles south of Deerfield, Illinois, according to highway maps.

On Friday, August 6, 1965, a home in Deerfield, Lake County, Illinois, was entered by Scarpelli and Frank Kleckner, who had been his accomplice in the Wisconsin robbery (App. 29). Police appeared within minutes in response to a burglar alarm and the men fled through a rear window, which Kleckner broke, Scarpelli cutting his hand and wrist. Kleckner was wounded by police and Scarpelli was captured while hiding in the neighborhood some time later (App. 22-30).

The Department came into possession of a *Chicago Tribune* account of the burglary (App. 27-30) containing a photograph of Scarpelli in police custody showing his cut hand and wrist (R. 34, App. 30), and of a transcript of an unsigned Q. and A. statement Scarpelli gave to an assistant state's attorney of Lake County, Illinois, in which he admitted the burglary and related the facts (App. 22-27). In his traverse in this case

Scarpelli admitted making the statement but gave an improbable explanation for doing so and of his cut hand (App. 31-33), but no explanation for his presence near the scene of the burglary in Deerfield, far from both his residence and his place of employment and ostensibly without means of transportation.

He was still on the case load of his Racine probation agent, who, with the approval of his district administrator, put through a Case History Review on August 20, 1965, recommending revocation of probation, which was concurred in, on August 27, by the Chief of Probation and Parole Services (App. 18-19), and probation was revoked pursuant to sec. 57.03 (1), Wis. Stats., without a hearing, by the Director of the Department on September 1, 1965, ordering Scarpelli taken in custody and delivered to the reformatory (App. 19-20).

He was brought back from Illinois on September 3 pursuant to the Compact, sec. 57.13 (3), Wis. Stats., (App. 5, 34) and delivered to the reformatory on September 4, 1965 (App. 21), as authorized by law and the probation agreement, paragraph 5 (App. 12).

B. Legislative Facts

Relevant parts of the statutes referred to herein are printed above immediately preceding the Statement of Facts, except as otherwise noted.

In 1907 by Ch. 110 by the Wisconsin Laws of that year, the legislature enacted various sections of the Statutes conferring power on the Board of Control/[1] to parole prisoners, who were to remain in the legal custody and under the control

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/[1] Now Department of Health and Social Services. At the time of this case it was known as the Department of Public Welfare.

of the Board, subject at any time to be taken back within the prison on the written order of the Board. No provision was made for a hearing and although the parole system remains substantially the same as in the beginning, hearings have never been provided for. (A system of mandatory release parole similar to 18 U.S.C. §4163 was enacted in 1951 whereby prisoners who have served their maximum terms minus good time allowances are not absolutely discharged but are released [or continued] on parole. See *Hughes v. Burke* [7th Cir. 1964], 334 F. 2d 795.)

Two years later, (Ch. 541 of the Wisconsin Laws of 1909), the legislature set up a system of probation applicable to all but certain adult felons, which is integrated with the parole system (except in Milwaukee County which is not involved here). The power of revocation was, except in a limited class of cases, vested in the State Board of Control but the statute (sec. 4734g), required that the Board conduct a "full investigation and personal hearing" and that it be by reason of failure to conduct himself in accordance with the rules and regulations of the Board of Control relating to *parole*.

The requirement of a "full investigation and personal hearing" continued in the probation statutes through the Wisconsin Statutes of 1945, sec. 57.03 (1). However, the hearings had been mere formalities since there was never any question regarding the fact of violation/[1] and accordingly the 1947 legislature, by Ch. 477, sec. 5 of the Wisconsin

/[1] The same condition (re parole revocations) was reported by 4 Attorney General's *Survey of Release Procedures* (1939), 246: "In practically every instance, the hearing on a parole violation is merely a formality to permit the returned violator to give his version of the events which led up to the revocation of his parole. As far as the parole authorities are concerned, the facts justifying the revocation of the parole almost invariably are clearly established before the time of (or concurrent with) the return of the offender to the institution."

Laws of that year, adopted a revised version of sec. 57.03 (1) *omitting the hearing requirement,*/[1] so that the revocation of both parole and probation thereafter was conducted by administrative practices which were identical. The relevant portions of the probation and parole statutes of 1967, which were in effect at the time of Scarpelli's revocation, were sections 57.03 (1) and 57.06 (3).

The Wisconsin courts have always had the option of either imposing sentence and staying execution or withholding sentence, and in either case placing the defendant on probation./[2] If sentence was imposed and execution stayed, the defendant upon revocation is taken directly to prison. If sentence has been withheld, upon revocation he must be "brought before the court for sentence *which shall then be imposed without further stay.*"/[3] Scarpelli belongs to the first group, whose sentences had been imposed and execution stayed.

In a general revision of Wisconsin criminal procedure statutes in 1969, the probation laws were revised and restated without any substantive change relevant to the issues of this case. Wis. Stats., 1969, secs. 973.09, 973.10 and 973.11, not printed in this brief. They were slightly amended by Wisconsin Laws of 1971, Ch. 298; and by Ch. 125, sec. 517 of the Wisconsin Laws of 1971 the legislature provided for the gradual phasing out of the separate Milwaukee County system of probation whereby probation has been managed by the criminal

/[1] Chapter 477, Laws of 1947 was Bill 256, S., introduced by an interim committee created by Joint Resolution No. 79 of the 1945 Legislature to "study any and all matters relating to the revision and codifying of the public welfare laws of this state * * * [and] report its findings and recommendations to the legislature of 1947 at the opening of its regular session."

/[2] Wis. Laws 1909, ch. 541, creating sec. 4734a, Wis. Stats.; Wis. Stats. 1967, sec. 57.01 (1).

/[3] Wis. Laws 1909, ch. 541, creating sec. 4734g, Wis. Stats.; Wis. Stats. 1967, sec. 57.03 (1).

branches of the county and circuit courts through the Milwaukee County Adult Probation Department, with power of revocation vested in the courts. These facts are mentioned for the Court's information only and have no bearing on this case; hence the statutes and session laws are not printed herein.

C. Facts Relating to Administration of the Law.

Materials relating to the administration of parole and probation revocation with special reference to Wisconsin are in the Addendum to this brief.

Wisconsin has no parole board in the usual sense. A group of employees of the Department so designated recommends the *granting* of paroles but has nothing to do with *revocation.* It was described thus in *Tyler v. State Department of Public Welfare* (1963), 19 Wis. 2d 166, 169, 119 N.W. 2d 460, which is still valid:

> "There are no statutory provisions governing the application for parole nor requiring a hearing thereon. The statutes do not provide for a parole board. The powers of the department are vested in the director, to be exercised under rules which he establishes with the approval of the State Board of Public Welfare.
>
> The parole board is governed by an administrative order of the director. The parole board consists of the director of the division of corrections and three full-time civil-service members. The board is required to conduct hearings on application for parole, and to follow a manual entitled, 'Parole Board Procedures and Practices.' The order states that the director of the department is the final authority and that the board is to make recommendation to him in an advisory capacity. We take judicial notice of both order and manual."/[1]

Both parole and probation revocations have hitherto, including the time of the *Scarpelli* case, been the business of

the "probation and parole services," in which the initial recommendation is made by the local probation and parole agent and is reviewed by his superior and ultimately by the chief of probation and parole services (now bureau of probation and parole). If all concurred in the recommendation for revocation it was referred to the Director (now the Secretary) of the Department, who made the revocation order (App. 18-20)./[1] Now, owing to court decisions, a hearing before a hearing examiner independent of the Division of Corrections is held on the recommendation of the bureau of probation and parole, and he reports his findings and recommendation to the Secretary of the Department.

SUMMARY OF ARGUMENT

Although *Morrissey v. Brewer* (1972), — U.S. —, 92 S.Ct. 2593, 40 U.S.L.W. 5016 forecloses argument that no hearing is constitutionally required on probation revocation, some clarification is needed concerning the extent of the hearing on whether the violations merit revocation, and the impracticability of probable cause hearings in out-of-state supervision cases.

Since 1963 the question of right to counsel in criminal cases has usually depended on application of the Sixth Amendment to the state through the Fourteenth, although some cases not within the Sixth Amendment find a right to counsel on other grounds such as equal protection or the need of the client for the guiding hand of counsel.

Probation and parole revocation is not a part of the criminal prosecution within the Sixth Amendment and therefore any right to assistance of counsel as a plain due process requirement depends upon the need for it. Reasons why criminal

/[1] Note, 1966 Wis. L. Rev. 527-529 (Addendum pp. 114-116).

prosecution defendants need counsel are examined and found inapplicable to revocation hearings. In fact, intrusion of counsel in such matters is affirmatively undesirable.

Probationers and parolees with money to spend for attorney fees ought to save it for when they get out or apply it to more fruitful uses, since counsel cannot be of any real help in forestalling revocation. Moreover, permitting them to appear by counsel may be a denial of equal protection to the poor and indigent, and assignment of counsel for the latter would be an intolerable waste of tax funds in these times when local and state governments are desperately short of money, and corrections, which needs more probation and parole agents rather than attorneys to engage in bootless litigation, must compete for the tax dollar with more visible and clamorous demands such as those of education, public assistance, law enforcement and dozens more.

ARGUMENT

I. It Seems That The Argument That No Hearing Is Required On Revocation Of Probation Is Now Foreclosed By This Court's Decision In *Morrissey v. Brewer* (1972), — U.S. —, 92 S.Ct. 2593, 40 U.S.L.W. 5016.

A. Parole and probation cannot be distinguished.

The statement of the question presented was intended to raise the issue of whether any hearing was required on revocation of probation and if so whether the probationer was entitled to assistance of counsel.

In the parole case of *Morrissey v. Brewer*, decided three days after certiorari was granted in this case, this Court disposed of the first part of the issue, since there is

no substantial distinction between revocation of probation following sentence and revocation of parole, as practiced in Wisconsin. Arguably, a probationer has even more to lose than a parolee, but that is more theoretical than real. The authors of the materials on *Criminal Justice Administration* printed in the Addendum to this brief, say at page 912 that those who make the revocation decision tend to be more cautious with revocation of probationers than they might be of parolees,/[1] but that is a slim reed on which to lean a legal distinction.

Accordingly, counsel for petitioner herein accept that the probationer is entitled to be heard, but with some reservations regarding the probable cause hearing, especially with regard to probationers and parolees like Scarpelli supervised out of state, as will be explained below.

B. The required extent of the hearing needs clarification.

Aside from the question of the out-of-state cases, a very troublesome problem exists in connection with the second question to be decided at the revocation hearing, whether the violation merits revocation. The materials in the Addendum, particularly Ms. Hunt's master's thesis, show that the revocation decision frequently depends upon collateral facts apart from the sometimes relatively minor violations. These collaterals are frequently a series of events disclosing unresponsiveness to or rejection of supervision, deterioration in adjustment to community living, or need for services available in the institutions but not in the community such as AA or psychiatric therapy. Sometimes the experience of the offender during prior terms of probation or parole, or his psychiatric appraisal at a penal institution or mental hospital, is relevant.

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[1] Addendum p. 185

The question is, then, whether all such matters, which are not easily susceptible of proof, must be established at the hearing with confrontation on demand or ignored in the revocation decision, however strongly they appear in the Department's chronological records. This claim is now being made on the basis of *Morrissey*.

Courts in making their sentencing decisions (even in so solemn a matter as choosing the death penalty) are permitted to use information supplied in pre-sentence reports by probation officers without submitting it to litigation at a due process hearing, precisely because probation officers are considered reliable and unbiased as investigators of such matters. *Williams v. New York* (1949), 337 U.S. 241, 249-251:

> "Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. *The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination.* Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

"The considerations we have set out admonish us against treating the due-process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence. * * *" (Emphasis supplied.)

It would be anomalous now to hold that the officers whose reports may be accepted by the courts may not themselves use the information in arriving at a comparable decision whether or not to revoke probation or parole.

It will not do to respond that a court is more venerable, wise and honorable than an administrative officer or body, that judicial powers are specially conferred by the Constitution, that sentencing is an ancient judicial power while revocation of probation by an administrative body is a statutory newcomer, or whatever like pious contention may occur to one. The facts are that judges are lawyers and probation officers are social workers and both are men and women trying to do the right thing in like circumstances.

II. The Preliminary Hearing Commanded By This Court In *Morrissey v. Brewer* (1972), — U.S. —, 92 S.Ct. 2593, 40 U.S.L.W. 5016, 5020-5021, Is Impractical In Interstate Cases.

In *Morrissey*, this Court held that not merely one, but two hearings are required, the first a preliminary hearing to determine probable cause.

It has been considered settled that in criminal prosecutions, due process does not require a preliminary hearing.

Goldsby v. United States (1895), 160 U.S. 70, 73;

Lem Woon v. Oregon (1913), 229 U.S. 586;

United States ex rel. Kassin v. Mulligan (1935), 295 U.S. 396, 400;

Odell v. Burke (1960), 281 F. 2d 789;

M.A.P. v. Ryan (D.C. App. 1971), 285 A. 2d 310.

Cf. *Coleman v. Alabama* (1970), 399 U.S. 1, 8, 17-18.

If this is true in the case of persons who are merely charged but not yet convicted, it comes as a surprise to learn that it is not true of persons who have been convicted and who are in the custody of a department which is in possession of information considered by it sufficient to initiate revocation proceedings.

But be that as it may, this new rule presents special problems where the parolee or probationer, as in Scarpelli's case, has been given the benefit of the law permitting him to leave the convicting state and be supervised elsewhere. It will be particularly troublesome if this Court should hold that the convict is entitled to representation by counsel at such a hearing.

Scarpelli was permitted to go to Illinois for supervision under the interstate compact authorized by act of Congress, the text of which is printed above as sec. 57.13, Wisconsin Statutes of 1967, which is in effect in all the states, Puerto Rico and the Virgin Islands. Records (not in the record of this case) of the Wisconsin State Department of Health and Social Services (successor to the Wisconsin State Department of Public Welfare, successor to the Wisconsin Board of Control) disclose that on June 30, 1972, Wisconsin had a total of 642 parolees and probationers, including a handful of juveniles under the Interstate Compact on Juveniles, in other states, of whom 374 were adult probationers. Border states were supervising the following numbers of Wisconsin probationers and parolees:

Illinois, 199;
Minnesota, 156;
Michigan, 35;
Iowa, 13.

But substantial numbers were being supervised in distant states, for example:

Arizona, 12;
California, 35;
Colorado, 15;
Florida, 19;
Hawaii, 1;
New York, 11;
Puerto Rico, 8;
Texas, 19.

Figures released by the Council of State Governments, 36 West 44th Street, New York, New York 10036, in January 1972, showed that in 43 states, Puerto Rico and the Virgin Islands reporting adult parolees sent out of state for supervision and in 42 states, Puerto Rico and the Virgin Islands reporting adult probationers sent out of state for supervision, 24,693 persons were assigned for supervision out of state on June 30, 1971. For case load figures for June 30, 1964, as reported by 46 states, see the *Handbook on Interstate Crime Control* (1966), page 9. Owing to imperfect reporting, these figures must be regarded as minimal.

Under section 3 of the Compact (Wisconsin Statutes 1967, sec. 57.13 (3)) the sending state may at any time retake the probationer or parolee from the receiving state without formality and without extradition (unless he is charged with or suspected of crime in the receiving state, when the consent of the receiving state is required) and the decision of the sending state to retake is not reviewable within the receiving state.

Under the rules, the receiving state is required to notify the sending state promptly of a parole violation, giving both the official and the parolee's version of the act, if possible, and accompanied by a recommendation of the receiving state. *Handbook on Interstate Crime Control* (1966) 10, 12. Upon receipt of this violation report the authority of the sending state must determine whether to retake the subject, and this entails a preliminary decision whether to revoke.

However, neither state is in a position to conduct the preliminary hearing required by *Morrissey*. Obviously, the State of Wisconsin cannot send its hearing examiner to Hawaii or to Puerto Rico or even to Illinois or Minnesota to conduct such a hearing, and the receiving state is without jurisdiction to make the preliminary determination of probable cause to revoke.

Assuming then that a tentative revocation determination has been made and the subject has been returned to the sending state, the preliminary hearing close to the place of the violation or arrest with possible confrontation by witnesses is impractical if not impossible. What can be done is to lodge the probationer or parolee in an appropriate county jail long enough to confront him with the reports obtained from the receiving state and obtain his story, if it has not already been submitted by the receiving state pursuant to the rules. But this would be a fruitless and unsatisfactory proceeding since it would add nothing of significance to what the Department learned before it made its determination to retake the subject from the receiving state, unless, indeed, the subject were to admit the violation and waive the second hearing. For this, though, an interview, not a hearing, is sufficient.

Perhaps in Scarpelli's case the assistant state's attorney and the investigating police could be induced to come voluntarily to Wisconsin to testify if demanded by Scarpelli, but

clearly they could not be compelled to do so. The Uniform Act for the Rendition of Witnesses Across State Lines in Criminal Proceedings applies only to proceedings or investigations by a grand jury or a criminal action, prosecution or proceeding. *Handbook on Interstate Crime Control* (1966), page 158. And if the witnesses had to be produced from Florida or New York or California the likelihood of voluntary appearance would be lessened and the expense of obtaining them, if they could be persuaded to come, would be greatly increased.

Nor is there any provision for taking depositions, which would be a clumsy and expensive way of obtaining their testimony and would not result in confrontation with the probationer or parolee.

III. Most Modern Cases In This Court Holding A Right To Counsel Go On The Theory Of Applying The Sixth Amendment Through The Fourteenth Amendment.

There would be little profit and an unconscionable waste of time and space in more than a cursory review of this Court's principal decisions on right to counsel. The bulk of them, beginning in 1963, if they involve state cases, and whether they involve counsel at trial or at other stages of the criminal prosecution, are grounded upon the legal theory that the Sixth Amendment right to counsel is applicable to the states through the due process clause of the Fourteenth Amendment:

Gideon v. Wainwright (1963), 372 U.S. 335, 339-40 (trial);

Argersinger v. Hamlin (1972), — U.S. —, 92 S.Ct. 2006, 32 L.Ed. 2d 530, 40 U.S.L.W. 4679, 4680 (trial);

Coleman v. Alabama (1970), 399 U.S. 1 (preliminary hearing);

Escobedo v. Illinois (1964), 378 U.S. 478, 479 (confession);

Miranda v. Arizona (1966), 384 U.S. 436 (confirming principles of *Escobedo*);

Mempa v. Rhay (1967), 389 U.S. 129 (sentencing);

McConnell v. Rhay (1968), 393 U.S. 2 (sentencing);

United States v. Wade (1967), 788 U.S. 218, 224-7 (police lineup);

Gilbert v. California (1967), 388 U.S. 263 (police lineup; applying *Wade* case to a state prosecution);

Kirby v. Illinois (1972), — U.S. —, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (out-of-court identification).

But before *Gideon* this Court found a right to counsel in the due process clause without basing its decision on the Sixth Amendment.

The first to be noted is *Powell v. Alabama* (1932), 287 U.S. 45, 68-69, holding that in a capital case, indigent defendants were entitled to appointment of counsel for their defense. The right to appear by counsel was found not because it was enumerated in the Bill of Rights, but because it was of such a nature that it was included in the conception of due process of law. (More of this later.)

Powell was later extended to other parts of the prosecution than the trial itself, still without reference to the Sixth Amendment, based upon the pressing need of defendants for the guiding hand and assistance of counsel. See for examples:

Moore v. Michigan (1957), 355 U.S. 155 (plea of guilty);

Hamilton v. Alabama (1961), 368 U.S. 52, 54 (arraignment).

In *White v. Maryland* (1963), 373 U.S. 59, decided just after *Gideon*, this Court in a *per curiam* held that *Hamilton* applied to a preliminary hearing at which the uncounseled defendant "pleaded guilty," which purported plea was used against him at his trial. There was no reference to either *Gideon* or the Sixth Amendment.

Pre-*Gideon* cases were developed in the light of the rule of *Betts v. Brady* (1942), 316 U.S. 455, 461-462, that "the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment," now overruled on the right to counsel by *Gideon* and *Argersinger*.

Other cases in which a right to counsel has been found by this Court to exist on due process grounds where the Sixth Amendment does not apply are:

In *In Re Gault* (1967), 387 U.S. 1, 36-37, the right to counsel in juvenile delinquency hearings, although not themselves criminal prosecutions, was based on the proposition that the needs of a child whose liberty was in danger for assistance of counsel were the same as those of an adult, quoting *Powell*.

In *Douglas v. California* (1963), 372 U.S. 353, the right to appointed counsel for an indigent appeal in a criminal case was based on the equal protection clause since persons who could afford to pay attorneys were, of course, permitted to appear by counsel. Exclusion of retained counsel from revocation hearings eliminates the equal protection problem in this context.

In *Goldberg v. Kelly* (1970), 397 U.S. 254, 270-271, holding that hearings are required before termination of Aid to Families with Dependent Children and similar aids, this Court held that the recipients of such aid must be permitted to appear at such hearings with *retained* counsel if they so desire, but not that counsel must be appointed for indigent ones (presumably the bulk of such beneficiaries). This was based solely upon a partial quotation from *Powell v. Alabama* that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel," and the assertion that "counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipients." (None of these points are applicable in revocation hearings.) To this day, there is no judicial or administrative requirement for assigning counsel in these hearings.

It is fair to say that the cases which are not grounded on the Sixth Amendment and which find a right to counsel in the due process clause of the Fourteenth Amendment independent of the Bill of Rights have their foundation in a determination that representation by counsel is essential to reliable fact finding and protection of the legal rights of the party represented. This is not the case in probation and parole revocation hearings, at least in a system such as that of Wisconsin where the entire apparatus is manned by professionals strongly motivated in favor of the best interests of the probationers and parolees although necessarily ever mindful of the obligation to protect the community and its members against antisocial conduct by persons in their charge.

It remains to observe that at least a plurality of this Court in *Kirby v. Illinois* (1972), — U.S. —, 92 S.Ct. 1877, 32 L.Ed. 2d 411, limited the right to counsel at lineups strictly

to cases within the Sixth Amendment, excluding those occurring before commencement of the criminal prosecution.

And this may presage a like determination regarding parole and probation revocation hearings regarding which this Court has just now said in *Morrissey v. Brewer* (1972), — U.S. —, — L.Ed. 2d —, 92 S.Ct. 2593, 2600, 40 U.S.L.W. 5016, 5018-5019:

> "We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Cf. Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336 (1967). Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions."

IV. State Courts And United States Courts Of Appeal Have Differed Among Themselves On Whether There Is A Constitutional Right To Counsel At Revocation Hearings.

A recent Annotation canvassing the case law on the right of alleged parole violators *vel non* to appear by counsel appears in (1970) 33 A.L.R. 3rd at 272-282.

The first case was *Fleming v. Tate* (Ap. D.C. 1946), 156 F. 2d 848, 849, in which the court held that the statutory right of a District of Columbia parolee to a hearing on charges of violation included the right to representation by retained but not by assigned counsel, and to present witnesses.

Other cases, holding that there is *no* right to *appointed* counsel are:

Jones v. Rivers (4th Cir. 1964), 338 F. 2d 862;

Hyser v. Reed (1963), 115 App. D.C. 254, 318 F. 2d 225, *cert.* den. 375 U.S. 957;

Martin v. U.S. Board of Parole (D.C. Dist. 1961), 199 F. Supp. 542;

Lavendera v. Taylor (D. Kan. 1964), 234 F. Supp. 703 affirmed (10th Cir. 1965), 347 F. 2d 989;

U.S. ex rel. Bradshaw v. Parker (M.D. Pa. 1969), 307 F. Supp. 451.

Cases holding that there is *no* federally protected constitutional right to counsel are:

Dunn v. California Department of Corrections (9th Cir. 1968), 401 F. 2d 340, 342;

Eason v. Dickson (9th Cir. 1968), 390 F. 2d 585, 588;

Gonzales v. Patterson (10th Cir. 1966), 370 F. 2d 94 (*per curiam* memorandum);

Williams v. Patterson (10th Cir. 1968), 389 F. 2d 374;

Washington v. Hagan (3rd Cir. 1960), 287 F. 2d 332, 334, *cert.* den. 366 U.S. 970;

Robinson v. Cox (1966), 77 N.M. 55, 419 P. 2d 253;

In Re Tucker (1971), 95 Cal. Rptr. 761, 486 P. 2d 657, 660-661;

Johnson v. Stucker (1969), 293 Kansas 253, 453 P. 2d 35, *cert.* den. 396 U.S. 904.

The federal cases are reviewed and summarized, including *Hyser v. Reed* (1963), 115 App. D.C. 254, 318 F. 2d 225, *cert. den.* 375 U.S. 957, in *Jones v. Rivers* (4th Cir. 1964), 338 F. 2d 862. Those which, like *Jones*, held that retained counsel must be permitted to appear but counsel need not be assigned for indigents ignored or passed over the danger that such a result would produce a holding that the equal protection clause requires assignment of counsel if retained counsel is permitted to appear. See the concurring opinion of Judge Sobeloff, 338 F. 2d at 876 and *Earnest v. Willingham* (10th Cir. 1969), 406 F. 2d 681 and compare *Douglas v. California* (1963), 372 U.S. 353. See also, *Robinson v. Cox* (1966), 77 N.M. 55, 419 P. 2d 253.

V. Wisconsin Case Law Relating To Revocation Hearings And Representation By Counsel.

The Wisconsin Supreme Court has sought a *modus vivendi* with the rules announced by the Court of Appeals for the Seventh Circuit, in its approach to the problem presented to this Court.

After holding in many unpublished opinions, including this case (see R. 6-7), that no hearing was required for revocation of parole or probation, the Wisconsin Supreme Court in April, 1971, decided to follow the decision of the Court of Appeals in *Hahn v. Burke* (7th Cir. 1970), 430 F. 2d 100, decided August 19, 1970, rehearing denied September 29, 1970, in the case of *State ex rel. Johnson v. Cady* (1971), 50 Wis. 2d 540, 185 N.W. 2d 306. There was pending at that time in this Court a petition for certiorari in the *Hahn* case which was subsequently denied, 402 U.S. 933. In *Hahn* the Seventh Circuit held a probationer entitled to a hearing on revocation but was silent on the subject of counsel.

In *Johnson*, the Wisconsin Supreme Court considered and *specifically rejected* the claim that the alleged violator had a constitutional right to be represented by counsel, citing *Mempa v. Rhay* (1967), 389 U.S. 128 and a number of cases from lower federal courts and other states. 50 Wis. 2d at 553-555.

The hearing envisioned by *Johnson* was a simple affair, "giving petitioner a reasonable opportunity to explain away the accusation that he had violated the conditions of his probation or parole, * * * not * * * a formal trial-type hearing and * * * technical rules of evidence need not be observed." 50 Wis. 2d at 548-549.

Next, the Court of Appeals in December, 1971, made its decision below holding that there *was* a constitutional right to representation by counsel, contrary to the freshly announced holding of the Wisconsin Court in *Johnson*. The Wisconsin court then took the first opportunity to reverse itself again in a case involving a juvenile who had been released to field supervision, disappeared for five weeks and was arrested by police after which he was returned to the Department's reception center and after a hearing at which his counsel was excluded, was reassigned to the boys school from which he had been released. He commenced a habeas corpus action in the Wisconsin Supreme Court which, after issue was joined and the cause argued orally, referred it to a referee where evidence was stipulated into the record upon which the referee made a report to the supreme court unfavorable to the juvenile. On May 4, 1972, the supreme court — without waiting for a motion or brief or argument, and dividing four to three — decided to follow *Gunsolus v. Gagnon* (1971), 454 F. 2d 416 (this case) on the question of counsel and to apply it to the juvenile case, ordering him remanded to the Department for a hearing in

accordance with the opinion, meaning *inter alia* with counsel, or that he be again released to field supervision. *State ex rel. Bernal v. Hershman* (1972), 54 Wis. 2d 626, 196 N.W. 2d 721.

The respondent in *Bernal* moved for a rehearing on the grounds, among others, that the case had become moot because Bernal's release had been ordered by another court pursuant to *In Re Gault* (1967), 387 U.S. 1, on the ground that his original commitment was invalid, prior to the decision of the supreme court, but the rehearing was denied. 54 Wis. 2d at 637. The mandate, however, was set aside and the opinion slightly modified.

The petition for certiorari in the present case was pending at that time. We were unable to petition for certiorari in *Bernal* because it had become moot. Since it was decided solely on federal grounds, on the issue of the right of counsel, it will necessarily fall if this Court disagrees with the Seventh Circuit on that issue in the present case.

Next, the supreme court was confronted with an adult case in which probation had been revoked by the department and the defendant returned to court for sentencing, which had been withheld at the time of conviction. Sentence was first imposed without counsel representing the defendant but ultimately that sentence was vacated and he was resentenced with counsel present in his behalf and credit was given for the time already served. The Supreme Court on June 30, 1972, citing *Bernal* and *Gunsolus* and dividing five to two, held that the petitioner was entitled to a probation revocation hearing with counsel and remanded the cause for that purpose. *Oestrich v. State* (June 30, 1972), 55 Wis. 2d 222, 198 N.W. 2d 664. It has been determined not to petition this court for certiorari in that case for two reasons:

1. The record is not appropriate since it contains a signed waiver of hearing by the defendant,/[1] and

2. Again, the case having been decided solely on federal grounds, it will fall as precedent if this Court disagrees with the Seventh Circuit on the issue of the right to counsel.

Although the decision in *Oestrich* was announced four days after certiorari was granted in this case, it was undoubtedly prepared before that and it does not appear that the court was aware that certiorari was granted.

/[1] "I, Lawrence Oestrich, having been advised that I am alleged to have violated my probation by the following:

'The aforesaid has failed to keep himself steadily employed, has left the state without permission, has failed to keep in contact with his probation officer and has demonstrated he is a poor candidate for probation supervision.'

and being further advised that I have a right to a hearing on the question of probation revocation, hereby voluntarily waive my right to a hearing to contest the allegations that I have violated the terms of my probation.

/s/ Lawrence Oestrich

Signed in the presence of:

/s/ Otis Lund

/s/ James Kavanagh

Dated:

Oct. 6, 1970"

The material facts leading to the execution of the waiver and the order of the department revoking the defendant's probation are set forth in a letter to the sentencing court, and appear in the record as follows:

"The defendant had absconded to California on August 2, 1970, and returned to Wisconsin on August 26, 1970; he failed to report his return to his probation officer, and was apprehended by the Madison Police Department, on August 28, 1970, pursuant to the department's order therefore dated August 13, 1970, the defendant having been advised both orally and in writing as to the reason for the probation officer's recommendation that his probation be revoked and that he be returned to the court." (R. 15, 16) State's Brief, page 4.

It seems to counsel that the alacrity of the Supreme Court of Wisconsin in deciding *Bernal* and *Oestrich* as it did may have been owing to a desire to resolve a serious impasse existing in Wisconsin. Not only had the Court of Appeals held there was a right to counsel in probation revocation cases, but the United States District Court for the Eastern District had held the same with reference to parole revocations. *Goolsby v. Gagnon* (E.D. Wis., 1971), 322 F. Supp. 460. This case and quite a number of others are now on appeal in the United States Court of Appeals under submission awaiting the decision of this case.

The Department has no authority to appoint counsel for an indigent parolee or probationer nor, probably, should it have such authority. Compare *Jones v. Rivers* (4th Cir. 1964), 338 F. 2d 862. The courts have no statutory authority to appoint counsel for indigent parolees, but perhaps have colorable authority to appoint counsel for probationers. It was therefore impossible to comply with the command of *Goolsby*, but some courts were persuaded to appoint counsel to represent indigent *probationers*. It was of no use to conduct revocation hearings without counsel for indigent probationers and parolees, since the federal courts would simply enlarge them on habeas corpus. Hence *Bernal*, where the court ruled that the committing court must appoint counsel for the indigent, and *Oestrich* extending *Bernal* to an adult case.

VI. This Court In *Mempa v. Rhay* (1967), 389 U.S. 128, Required Representation By Counsel At Sentencing Only, Not At The Probation Revocation Hearing.

At the risk of beating a dead horse, we briefly point out that this Court in *Mempa* did not (as the district court below and some other courts have thought) hold that a probation

revocation hearing was part of the criminal prosecution at which the probationer was entitled to counsel. The holding and the state's contention are stated at 389 U.S. 134-135:

> "There was no occasion in Gideon to enumerate the various stages in a criminal proceeding at which counsel was required, but Townsend, Moore, and Hamilton, when the Betts requirement of special circumstances is stripped away by Gideon, clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected. In particular, Townsend v Burke, supra, illustrates the critical nature of *sentencing* in a criminal case and might well be considered to support by itself a holding that the right to counsel applies at *sentencing*. Many lower courts have concluded that the Sixth Amendment right to counsel extends to *sentencing* in federal cases.
>
> "The State, however, argues that the petitioners were *sentenced* at the time they were originally placed on probation and that the imposition of sentence following probation revocation is, in effect, a mere formality constituting part of the probation revocation proceeding." (Emphasis supplied.)

This Court then replied to the state's argument by referring to the importance of counsel at a Washington sentencing *but said nothing of the revocation aspect.* Clearly, if the Washington judge had held the revocation hearing without counsel, revoked probation and adjourned the case for sentencing, at which the defendant was represented, this Court would have found no denial of due process.

See also *McConnell v. Rhay* (1968), 393 U.S. 2, 4.

VII. This Court Has Just Now Held That Parole Revocation Is Not Part Of The Criminal Prosecution.

In *Morrissey v. Brewer* (1972), — U.S. —, 92 S.Ct. 2593, 40 U.S.L.W. 5016, 5018, in which this Court left open the question of the right of a parolee to representation by counsel at a revocation hearing, the Court said:

> "We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Cf. *Mempa v. Rhay*, 389 U.S. 128 (1967). Parole arises *after the end of the criminal prosecution, including imposition of sentence.*" (Emphasis supplied.)

So far as this goes toward eliminating Sixth Amendment considerations from determining the question of right to counsel at parole revocation hearings, it is equally appropriate to the problem before the Court of a probation revocation after sentencing. It is submitted, also, that in principle it applies at least to an administrative revocation hearing before sentencing where the probationer is in exactly the same posture before the department as though he had already been sentenced, the only difference being that upon revocation he is taken to the court for sentencing (which shall then be imposed without further stay) rather than directly to the penal institution. The citation of *Mempa* so indicates.

VIII. The Need For Counsel Does Not Exist In Revocation Cases.

The classical statement of the need of a defendant for counsel in a criminal case is in *Powell v. Alabama* (1932),

287 U.S. 45, 68-69, quoted in *Gideon v. Wainwright* (1963), 372 U.S. 335, 344-345 and in *Argersinger v. Hamlin* (1972), —U.S.—, 92 S.Ct. 2006, 32 L.Ed. 2d 530, 40 L.W. 4679, 4681:

> "The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

These reasons for having counsel do not apply to administrative revocation proceedings:

A. Validity of the charge.

The body of technical rules by which criminal complaints, indictments and informations are tested has no application to charges of probation and parole violation. The latter are drawn not by lawyers supposedly skilled in pleading, but by social workers functioning as probation and parole officers and administrators. Reasons for technical exactness applicable to criminal pleadings are not relevant. Charges for revocation are short narrative statements of what the "client" did in violation of the conditions of his conditional "freedom." No lawyer is needed to challenge their sufficiency.

B. The rules of evidence do not apply.

It is commonplace that the revocation hearings, like most administrative proceedings, are not subject to the rules of evidence applicable to trials in a court, whether with or without a jury. This has been most recently recognized by this court in *Morrissey v. Brewer* (1972), — U.S. —, 92 S.Ct. 2593, — L.Ed. 2d —, 40 U.S. L.W. 5016, 5021:

> "* * * We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense: it is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other materials that would not be admissible in an adversary criminal trial."

The Wisconsin Supreme Court in *State ex rel. Johnson v. Cady* (1971), 50 Wis. 2d 540, 549, 185 N.W. 2d 306, adopted the following language from *Johnson v. Stucker* (1969), 203 Kansas 253, 453 P. 2d 35, 42 *cert.* den. 396 U.S. 904:

> "A revocation hearing is not a trial in the traditional sense, nor is the board necessarily concerned with the commission of a criminal offense. As a matter of fact, a prisoner having been granted conditional freedom on parole, the primary question before the board is whether within its discretion the parolee is still a good parole risk. . . . By its very nature a revocation hearing does not envision strict observance of technical rules of law and procedure accorded a judicial proceeding. Any relevant information, even though in the form of letters, reports of parole officers, and similar matter, which may aid the board in making its determination, may be considered. . . ."

In holding that federal parolees are not entitled to compulsory process to procure witnesses in revocation hearings before the Parole Board, the United States Court of Appeals for the District or Columbia Circuit, per Judge Burger, stated in *Hyser v. Reed* (App. D.C. 1963), 318 F. 2d 225, 240:

> "As to the constitutional claim, it is sufficient to note that the Parole Board is not bound by the rules of evidence in considering information relating to parole violation. It is the established practice of the Board to consider all communications, i.e., affidavits, letters, telegrams, prison records, even though hearsay in the strict evidentiary sense, in reaching a conclusion. This flexibility affords greater protection to alleged violators than would be allowed in an adversary proceeding with conventional rules of evidence."

(*Hyser* held also that there was no constitutional right to representation by appointed counsel in such hearings. *Id.* at 238.)

Even illegally seized evidence is admissible in revocation proceedings.

United States v. Hill (7th Cir. 1971), 447 F. 2d 817, (U.S. probation revocation);

United States ex rel. Sperling v. Fitzpatrick (2nd Cir. 1970), 426 F. 2d 1161 (U.S. parole revocation);

In Re Martinez (1970), 83 Cal. Rptr. 382, 463 P. 2d 734, 740-741 (state parole revocation).

Compare *United States ex rel. Santos v. New York State Board of Parole* (2nd Cir. 1971), 441 F. 2d 1216. (Evidence seized by a parole officer on search of a parolee's room under circumstances impermissible against an ordinary person was held admissible on his trial for a new offense.)

It is customary, in the case of former narcotic addicts on probation or parole to require as a condition thereof that they submit to the police department on demand without warning urine specimens to be tested for opiates, which is a reasonable way to try to prevent relapses into addiction.

Under Paragraph 3 of the Probation Agreement (Ap. 12) the probationer is required to keep his agent informed of his whereabouts and activities at all times and to submit such reports as may be required. Accordingly, statements may be obtained from him without the *Miranda* warnings and may be used against him *for purposes of revocation.*

In Re Tucker (1971), 95 Cal. Rptr. 761,
486 P. 2d 657, 658;

In Re Martinez (1970), 83 Cal. Rptr. 382,
463 P. 2d 734, 740-741.

The probationer or parolee, being in custody of the Department is subject to search of his quarters as his cell would be if he were in prison. He waives his Fifth Amendment rights against self-incrimination. One who is on probation or parole may not get himself into a position where he cannot be searched without disclosure of incriminating evidence, or refuse to give truthful answers regarding his activities and whereabouts without incriminating himself.

The probationer or parolee may be immune from use of such evidence against him in a criminal prosecution (see *U.S. ex rel. Sperling v. Fitzpatrick, supra,* but compare *U.S. ex rel. Santos v. New York State Board of Parole, supra*) but not in revocation proceedings.

C. No defense requiring legal skill need be prepared.

It is a fact of life that no probationer or parolee is recommended for revocation unless he did the things alleged against him. This is because the probation and parole agent is so strongly motivated against revocation that he does not recommend it unless he is sure, and to that end he investigates

with as much thoroughness as an attorney would and perhaps with better entree to information sources. Of course, he must depend upon others, in some cases, and must make judgments on their reliability, but always following up all possible leads, and where possible interviewing the "client" and checking out his story. He is not hostile to the probationer or parolee, nor is he an advocate bent upon his destruction.

Of course, some facts, such as absconding, are self-evident and no excuse is acceptable, and many other facts are within the personal knowledge of the agent or are reflected in the file he has received showing background facts, which influence the decision to recommend revocation./[1] No defense counsel is going to alter such things by "marshalling the facts."

D. No plea bargaining is possible.

So much for the reasons advanced in Powell.

The most useful function an attorney representing a guilty defendant charged with crime can perform is not in testing the sufficiency of the charge — that can be amended or the state can start over — or in applying the rules of evidence at trial, or in preparing his defense, be it complete or only partial, as in the case of conviction on a reduced charge. Given a guilty defendant and strong proofs on the part of the prosecution, the most useful function of the defense counsel is in plea bargaining. If in return for a guilty plea he can induce the prosecutor to dismiss some charges or reduce the degree of the charge, or substitute a lesser offense, or recommend a lighter sentence or probation, he has accomplished a great deal for his client.

But in revocation hearings there is no reason for plea bargaining. It is all or nothing with the scales heavily tipped

[1] See materials in Addendum.

against his client. The judgment of the probation or parole agent and his superiors that revocation is the only solution to the problem of the violator is bound to be respected and any alternatives which may have occurred to the attorney, at best an amateur in the field of probation and parole supervision, must have occurred to and been rejected by the supervising agent and his superiors, professionals whose business it is to know the alternatives and apply them. See materials in the Addendum.

In summary, since there is no middle ground, there is no basis for negotiation.

E. There are no technical pitfalls to be avoided in revocation hearings.

In *Hamilton v. Alabama* (1961), 368 U.S. 52, this Court pointed out that the arraignment was a critical stage of a criminal prosecution in Alabama at which the accused requires the guiding hand of counsel because he must at that stage make pleas in abatement or a plea of insanity or waive his right to do so. No such situation exists in revocation cases, at which the probationer or parolee is free to advance whatever defenses or mitigating circumstances he thinks he has without reference to any procedural technicalities whatsoever.

F. There is no "attorney for the prosecution."

One reason frequently given for requiring counsel for a defendant in a criminal trial is that he must face an opponent in the form of a district attorney. This has not been true in the case of revocation hearings under the rule of *State ex rel. Johnson v. Cady* (1971), 50 Wis. 2d 540, 553-555, 185 N.W. 2d 306 holding that the alleged violator is not entitled to representation by counsel. Both sides appear without

counsel and tell their stories, subject to questioning by the hearing examiner, who is an attorney and is neutral. It is only since the decision of the court below made it necessary to permit representation of the probationer by counsel that the Department has found it necessary to assign some of its staff counsel to appear for the Division of Corrections, mainly because the probation agents feel the necessity for representation if they must confront counsel on the other side. Thus a simple inquiry becomes what it ought not be, an adversary proceeding.

IX. Intrusion Of Attorneys Into The Probation And Parole System Is A Negative Factor.

As one who has been an active member of the legal profession for 37 years, the writer is proud of that profession. Lawyers as a class are probably the most versatile in society, capable of handling litigation and other matters dealing with the widest variety of subjects and fields of learning such as medicine, accounting and engineering. But we are not trained by education or professional experience to deal with correctional matters or to aid those who are expert in that field in arriving at correct determinations.

We are by instinct and training contentious, taking up the cause of our clients with zeal and vigor. But as the 3rd Circuit said in *Washington v. Hagan* (3rd Cir. 1960), 287 F. 2d 332, 334:

> "The period of contentious litigation is over when a man accused of crime is tried, defended, sentenced and, if he wishes, has gone through the process of appeal. Now the problem becomes one of an attempt at

> rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole."

We learn from *Robinson v. Cox* (1966), 77 N.M. 55, 419 P. 2d 253, 255, that the New Mexico legislature enacted that "[t]he [parole] board shall not be required to hear oral statements or arguments by attorneys or other persons not connected with the correctional system."

Wisconsin does not have such a statute, but as shown above it abolished probation revocation hearings altogether 25 years ago (at which attorneys never appeared anyway) and never provided for parole revocation hearings.

There being nothing to gain from the attorney's appearance, there is yet some disadvantage. Hearings with counsel tend to take more time in arriving at their inevitable result, making fewer hearings possible in the parole agent's and the examiner's available time. Sometimes adjournments or continuances are necessary. Any therapeutic value of the hearing as envisioned by 4 Attorney General's *Survey of Release Procedures* (1939), 247 disappears if the violator's "irrational action" and "twisted thinking" are minimized or even supported by his attorney. Nor will his "true psychology" or the "trend of his thought." *Id.*, be accurately revealed if filtered through a legal spokesman.

If counsel appears for the alleged violator the agent demands that the department furnish him with representation (increasing the expense) and presto, the simple little personal hearing has become an adversary trial.

X. Probationers And Parolees Should Not Be Permitted To Retain Counsel For Revocation Hearings.

Since attorneys are unable to perform any real service for probationers and parolees who are up for revocation, there are three reasons why probationers and parolees should not be permitted to retain them:

1. Hardly any persons on probation or parole are wealthy although a great many have too much money and other assets to qualify as indigent. For every James Hoffa on parole there must be thousands who have the money to retain counsel but cannot really afford to do so. Such funds as they have should be diverted to more productive uses, such as support of their families, and all of them will need money when they are released at a future date. They ought not spend it in the vain hope that somehow an attorney can save them from revocation if they could not do so by their own efforts.

2. Those who are unable to employ counsel are likely to feel discriminated against.

3. If those who can afford counsel are permitted to appear by counsel, it is difficult to conceive of an answer to the claim that equal protection requires assignment of counsel to those too poor to pay for their own. The State of Wisconsin does not wish to be in the position of denying to the poor and indigent the equal protection of the laws by permitting appearance of counsel on the behalf of only those who are financially able to pay.

XI. Assignment Of Counsel At Public Expense Would Be An Intolerable Waste Of Public Funds.

As this Court must be aware, municipalities, counties and states throughout this country are desperately short of

tax funds for the general purposes of government. Washington is constantly being importuned for grants in aid, and outright revenue sharing is a current political issue. Indignant meetings of angry property taxpayers are reported in the daily press. Departments of state government are directed by the governor to reduce expenditures, even at a time when their duties are being increased.

Against this background, corrections must compete for the tax dollar with higher profile demands of education, public assistance, law enforcement, pollution control, and dozens more. What the probation and parole system needs is more money for manpower to supervise its clients and help them to obtain training and adjustment and to avoid relapse into criminal ways. Any expenditure of state funds for counsel to resist revocation is almost certain to be reflected in less money available for probation and parole agents. Moreover, as pointed out above, the department will necessarily have to employ attorneys to represent the Bureau of Probation and Parole.

Milwaukee County is still reeling under the financial impact of *Argersinger v. Hamlin* (1972), — U.S. —, 92 S.Ct. 2006, 32 L.Ed. 2d 530. It is claimed that that county is absolutely without funds to pay for counsel in revocation hearings. No state funds have been appropriated nor are likely to be.

In view of this financial crunch, it is wholly impossible to make a rational justification for the payment of assigned counsel to make futile attempts to head off what have become virtually inevitable revocations.

If there is some defense or excuse, the probationer has every opportunity to inform his agent and his agent's supervisor and, latterly, the hearing examiner, with every assurance

that unless his explanation or excuse is totally ridiculous it will receive consideration.

In the state's attorney's office Scarpelli gave neither a denial nor an excuse—just a complete admission replete with corroborative detail and inherent evidence of its voluntary and trustworthy character. (App. 22-27)

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and remanded with instructions to modify the judgment of the district court by striking the requirement that the probationer is entitled to the assistance of counsel at the revocation hearing.

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CERTIFICATE OF SERVICE

I the undersigned, a member of the bar of this court, do hereby certify that on September , 1972. I duly mailed three copies of the Brief of Petitioner to counsel for the respondent, addressed as follows:

Mr. William Coffey
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.....

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ADDENDUM

I.

CRIMINAL JUSTICE ADMINISTRATION MATERIALS AND CASES

by

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An offender who is free in the community may have that freedom withdrawn if he fails to comply with the conditions imposed by the court, the parole board, or other agency which granted that freedom. Less often the offender's freedom may be revoked, even though he has complied with the conditions of his release, because the supervising agent believes the offender is again likely to commit crime if not incarcerated. Whatever

the basis, the scope of the field agent's discretion is enormous because the conditions are commonly very broad and there are few probationers or parolees who do not, on occasion, violate one or more conditions. How the discretion is exercised, who is responsible, and the methods for insuring against inappropriate decisions to revoke are questions of fundamental importance.

1. *Responsibility for the Revocation Decision*

In all situations the supervising field agent plays a very significant part in the revocation decision, since he knows of the offender's conduct and decides initially whether or not to do anything about it. A difference between parole and probation lies in the agent's responsibility to report to an administrative superior in one case and to a judge in the other to have the decision to revoke made official. Parole revocation decisions are commonly wholly administrative. Probation revocation decisions are most often made by a judge, though sometimes they are made administratively.

If a judge suspends *imposition* of sentence and places the offender on probation, there is a practical reason for returning him to court since he alone has authority to impose sentence. However, if the sentence is imposed but its *execution stayed* and the offender put on probation, there is no need to return him to court for sentencing. Some jurisdictions, in this situation, permit administrative revocation. Others still require a judicial decision. Whether this type of decision ought to be "judicial" in nature or "administrative" or whether it makes any important difference, has not been subject to any very careful inquiry. Whichever method is used, the field agent's influence is great, but having to report to a judge, in court, may result in a different decisional process than would result if the agent had to report only to his superior.

2. *Factors Affecting the Decision Whether to Revoke*

The revocation process begins in the first instance with a decision by a parole or probation officer to instigate revocation proceedings. This is by no means an automatic response even when the offender has been arrested for a new crime nor, indeed,

does revocation necessarily accompany or follow conviction of a new offense. Field agents normally are expected to judge each individual case on its merits rather than to follow standard formulas. The individual field agent is controlled only in a general way by agency policies and by his superior within the agency. Agency guidelines are usually broad statements of objectives or procedures with no attempt to specifically direct or curtail field agent discretion. Supervision by an administrator, particularly of trained and experienced agents, is commonly viewed as a form of "consultation" rather than as a review of agents' specific decisions. Initiative and exercise of independent professional judgment are encouraged and supported if they are not totally inappropriate or at odds with agency objectives.

Administrative policy or supervision acts in direct check on agent discretion, if at all, only when the officer has decided to revoke. Decisions to take no action or to use some alternative short of revocation when confronted by violation tend to be of low visibility, much like police decisions not to arrest. Field agents normally make a written record of any discovered violations and of action taken, but this is simply good case recording and is usually not submitted for specific review by higher authorities. While it is technically possible for a judge or parole board member or other designated authority to revoke on his own initiative or over the opposition of the field agent, this rarely happens.

It is tempting, and in certain perspective appropriate, to compare the similarities of the revocation discretion of a parole officer and the arrest discretion of the police. Yet there are differences. For example, the number of arrests made by a policeman has often been taken—however unwisely—as an indication of his workload and even of his competence. Revocation, on the other hand, is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent *never* to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail.

Field agents who are trained social workers (and the master's degree in social work is the accepted professional model) claim a certain amount of expertise. Agents who are merely college graduates, or have even less formal education, cannot make the same claim to expertise, though experience can substitute for

formal training to some degree. The correctional position calling for broad field agent discretion rests on the assumption that field agents have social work expertise. The reliance in the police field has been on experience more than training. The claim to expertise is less often made by police.

While the parole or probation officer recognizes his double duty to the welfare of his clients and to the safety of the general community, by and large concern for the client dominates his professional attitude. The parole agent ordinarily defines his role as representing his client's best interests as long as these do not constitute a threat to public safety. The police officer, in contrast, is concerned primarily with public safety.

It would be unfortunate, however, to overemphasize the differences, because there are important parallels in the exercise of discretion by police and probation or parole officers.

Aside from the professional orientation, various other factors affect the probation or parole agent's decision whether to recommend revocation. One is the conceptual and practical difference between probation and parole (or mandatory release). The probationer has not served time (except in the special situation of a short jail term made a condition of probation), while the parolee has. The difference is suggested by the New Mexico Supreme Court:

> One who is paroled is not thereby released from custody but is merely permitted to serve a portion of his sentence outside the walls of the penitentiary, under such conditions as the board may impose and during the pleasure of the board. A paroled prisoner is not discharged from the custody of the prison authorities, but is at all times under the complete custody and control, and subject to the orders of the parole board, whereas, in the case of a suspension of sentence, the person has never commenced service of the sentence and has, therefore, the right of personal liberty. He is not in custody as is a parolee.[b]

It has often seemed that to revoke probation, which means sending a man to prison who has not been there, is more drastic than to revoke parole, which returns a man to prison. This

[b] Robinson v. Cox, 77 N.M. 55, 59, 419 P.2d 253, 256 (1966).

tends to make those who must make the revocation decision more cautious with respect to probationers than they might be to parolees.

The laws often operate to vary the impact of revocation from one state to another. For example, in about half the states, time served successfully on parole counts toward completion of sentence while time served on probation does not. In other states, time is tolled on both probation and parole. If a parolee has five years of his sentence remaining and serves four years of successful parole time before revocation, he must serve only a year where such credit is given but five years where "street time" does not count. In some situations, particularly in jurisdictions where reparole is rare, revocation for a minor rule violation may mean an extensive period of imprisonment for the offender. In other situations, the time remaining under sentence may be so short as to make revocation meaningless. Time served on probation does not at all diminish the possible period of imprisonment upon revocation.

Variations in the intensity of field supervision also affect revocation practices. In some jurisdictions, field supervision of both probationers and parolees is minimal, hardly more than a bookkeeping device. A probation or parole officer who is given a hundred or more offenders to supervise cannot closely follow each one or hope to provide casework services on a regular basis. This agent has little knowledge of conformity to or violation of supervision rules, and revocation therefore tends to become solely dependent on an arrest for a new offense. In effect the police perform whatever supervision or surveillance occurs. It is ironic that where field agents are well-trained, have small caseloads, and perform a more highly professional supervision function, revocations are more frequent. They discover more rule violations and, with clinical competence, are aware of the potential dangers in early signs of nonconformity and are more ready and willing to revoke before a new crime is committed.

The scope and generality of common probation or parole conditions give the field agent a broad range of grounds for revocation should he wish to use them. Requirements such as that the parolee "cooperate" with his field agent are common; the nearly universal condition is that the offender remain "law-abiding."

THE REVOCATION DECISION: A STUDY OF PROBATION AND PAROLE AGENT'S DISCRETION

By Sara K. Hunt
(Unpublished MSW thesis, The University of Wisconsin, Madison, School of Social Work, 1964)[1]

In Wisconsin's correctional system the probation and parole field agent is delegated primary responsibility for initiating the revocation process in cases under his immediate supervision. The agent is not compelled by law or administrative policy, however, to recommend revocation in every case involving known violations or new offenses. In fact, twenty-five percent of the offenders studied who committed new offenses were continued on field supervision, with perhaps short-term jail sentences following commission of new crimes. The authority to exercise discretion in deciding to revoke or not to revoke offenders under supervision is considered necessary if probation and parole are to remain workable systems.

The Decision to Revoke Offenders Under Supervision. The strongest single determining factor in the revocation decision was the seriousness of violation or new offense committed by the offender while under supervision. In view of the field agent's primary responsibility to the community and its protection, this factor would be expected to have importance. Cases where offenders were considered extremely dangerous to the community, however, were relatively infrequent. Revocations were generally based on additional considerations.

1

A youthful offender recently paroled from the Reformatory stole an automobile, taking it across several state lines in an attempt to abscond. He was apprehended by federal authorities, who issued a detainer for violation of the Dyer Act. Parole was revoked and the youth returned to the institution to serve the remainder of his sentence before being turned over to a federal agency.

---

[1] Some changes have been made to adapt the thesis to use here, without specific indication of the places at which the organizational changes were made.

In a majority of the cases revoked on conviction of a new offense or as a substitution for conviction, there were some outside pressures. Frequently the crimes committed were of high visibility, resulting in newspaper publicity. At other times police urged revocation when there was suspected but unproven misconduct.

2

A recent parolee was known to be living with a former parolee. Both individuals had extensive prior burglary records and were strongly suspected by the police of committing a series of recent burglaries in the area. Surveillance by police failed to uncover sufficient evidence for arrest. The supervising agent, sharing these suspicions and under pressure from the police department, revoked parole on the basis of minor rules infractions as a precautionary measure.

One principal objective in allowing rules violations to constitute grounds for revocation is to prevent resumption of criminal conduct during supervision. Preventive intervention by agents was not limited to cases considered potentially dangerous to the community but included offenders believed to be in need of a controlled environment or of specialized treatment services available only within the institutions.

3

A chronic alcoholic checkwriter, having refused any assistance from Alcoholics Anonymous, was known to be drinking heavily. Although unemployed, he reportedly had sums of money in his possession. The agent had not received notice of any outstanding checks, but anticipated they would eventually turn up at the D.A.'s office. Parole was revoked in hopes that the offender would resume his participation in AA programs available within the institution.

4

A youthful offender appeared to be making a good initial adjustment on parole. Signs of deterioration became evident, however, when the youth provoked his employer into firing him and made no effort to find other employment. This added strain to the youth's relationship with his stepfather, upon whom the boy projected blame for his delinquent behavior. Increasing association with delinquent

cronies led to the youth's participation in several acts of vandalism in the community. A work-home placement in another city was considered, but rejected due to the subject's defiant attitude toward supervision. While present violations were not considered particularly serious, the agent foresaw continuing delinquency unless action was taken. The decision to revoke was based upon the expectation that attitude toward supervision would improve prior to reparole.

A determining factor in revocations of offenders committing rules violations or relatively minor new offenses was their overall social adjustment in the community. In assessing offenders' adjustment, agents placed particular emphasis on the support of self and family and on the fulfillment of financial obligations to the courts and the community. In most revoked cases agents had persisted in their efforts to help individual offenders to assume these responsibilities and had failed. Revocation also occurred when offenders were totally unresponsive to supervision.

5

A probationer was living with a divorcee and failing to support his family adequately. Other violations were being committed in connection with this association, i.e., drinking in local taverns, leaving the state without permission, driving without a valid driver's license. Revocation followed the offender's arrest in another state on charges of illegal possession of beer in a car and no driver's license.

The offender's responsiveness to supervision as reflected by his attitude and his cooperation with the supervising agent appeared to be a prerequisite for continuing probation or parole supervision under any circumstances. In other words men committing relatively serious violations during supervision might be continued without revocation due to some appreciable changes in their attitudes, whereas others committing similar violations were revoked. What effect agents' workloads and time limitations had on revocation rates could not be determined.

6

A probationer convicted of bigamy was apprehended in the home of the woman with whom he had been ordered not to associate. This occurred within the second month of supervision. The agent recommended revocation on the basis that the case presented an unworkable situation for probation supervision. The offender was returned to court and sentenced to six months in the county jail.

7

In two similar cases the offenders requested revocation rather than continue under probation supervision. Both cases entailed six-month county jail sentences following revocation. When one offender's request was refused, he committed a minor offense to accomplish this end.

8

An habitual offender, presently on probation for a misdemeanor with sentence withheld, had required continuous attention during supervision with complex financial, marital, and behavioral problems. While not a serious offender, he had been arrested numerous times during probation for driving after his license was revoked. He did exhibit some violence when drinking excessively. At the point of revocation, the offender was unemployed, not supporting his estranged wife and his children, and making little effort to alter the situation. Revocation followed the agent's apprehension of the individual in a local tavern, only twelve days before probation expiration. Nonsupport charges were already pending, and the agent felt revocation would affect the subject's complacent attitude.

A factor accounting for some disparities in the revocation decision was the availability or unavailability of resources in the community. The need for outside resources as adjuncts to supervision ranged from intensive psychiatric treatment to jobs and places to live. It was found that the lack of some supportive, stabilizing influences in the community greatly reduced the probabilities that offenders would complete their probation and parole terms successfully.

9

A chronic alcoholic developed a severe case of delirium tremens. The family refused to commit him to a state hospital and could not afford medical services. The agent revoked supervision on the basis of needing institutional facilities not available in the community.

10

A parolee with over one hundred arrests on drunk and disorderly charges was revoked primarily for the nuisance he was causing the police department and for the agent's admitted inability to find a suitable placement within the community.

The Decision Not to Revoke Offenders Under Supervision. Offenders were not revoked when there was merely a suspicion of violation. The decision required proof.

11

Police officials strongly suspected a parolee of participating in a series of recent burglaries in the area. A police "dragnet" was placed around the subject's residence with no results. The supervising agent shared the suspicion that the parolee was involved, but felt he had no basis for revocation without additional proof.

The decision not to revoke offenders was made in spite of nondangerous violations during supervision and was frequently based on considerations other than the individuals' behavior alone. Thus it was found that offenders who were supporting their families were less apt to be revoked than those not supporting their dependents or having none, despite similar violations during supervision. Factors such as length of remaining sentence, especially when extremely short, sometimes had decisive influence in continuing field supervision in cases otherwise warranting revocation. Perhaps fundamental to the question of continuing the supervision of offenders who violate their probation or parole is the willingness of the individual field agents to provide those "second chances."

12

A recently divorced probationer admitted having impregnated a girlfriend, with whom he had been instructed not to associate. On the basis of the offender's willingness to pay the medical expenses and support of the expected child, the supervising agent decided against revocation.

13

An offender, placed on probation for nonsupport, immediately absconded from supervision. He was apprehended and reinstated on probation by the sentencing court. Throughout supervision worthless checks were written, usually in connection with heavy drinking, but were invariably made good after the agent applied pressure. As the offender did begin making support payments during supervision, the agent felt as much was being accomplished as could be expected. The probation sentence was allowed to expire.

14

A parolee was arrested his first day under field supervision for "drunk and disorderly conduct" and was subsequently charged for nonsupport on a warrant issued prior to his institutionalization. The agent knew the offender had previously absconded from field supervision as a probationer and, under these circumstances, might do so again. The agent did not consider the offender to be dangerous, however, and wanted to provide him an opportunity to prove himself. The offender had secured employment and appeared willing to cooperate. The supervising agent decided against revocation.

Just as lack of community resources influenced the decision to revoke some offenders, so the supportive help of outside persons or agencies in the community sometimes accounted for the continuation of field supervision despite violations. Examples of the types of resources considered to be instrumental in the supervisory process included reliable family members, employers, and interested citizens and/or the specialized services of social welfare and mental health agencies.

15

The supervising agent received a report that a parolee previously convicted of statutory rape had made sexual overtures toward a female client while he was working as a

door-to-door salesman. The employer came personally to the agent to urge that the parolee be given another chance. An agreement was reached whereby the offender would not be assigned evening house calls while working alone. The agent decided against revocation for the alleged violation.

The use of alternative actions in place of revocations tended to be more prevalent among probation cases than parole when comparable violations had been committed. One reason believed to account for this difference was the large proportion of misdemeanor probation cases having less than one-year sentences. Frequently supervision of misdemeanants was extended beyond the date of sentence expiration rather than revoking probation in cases having unfulfilled court financial obligations. Misdemeanor cases cannot be sentenced to state correctional institutions; consequently, offenders in need of specialized medical or psychiatric services must be accommodated in the community.

There were several cases which agents did not feel would benefit from institutionalization sufficiently to justify revocation. This evaluation may have been based on the offender's low mental capacities or on results of previous institutional experiences. Offenders considered beyond rehabilitating were sometimes continued on supervision despite repeated arrests and jail sentences due to chronic alcoholism, vagrancy, and the like. These cases were typically considered "nuisances" to local law enforcement agencies but not particularly dangerous to the community.

16

A probationer seriously assaulted his sister-in-law during a family dispute. Although no criminal charges resulted, family members felt that psychiatric attention was urgently needed. In addition to many rules violations, the subject's drinking problem had reached such proportions that an institutional placement was considered imperative by the agent. As a misdemeanant the alternative would have been a county jail sentence. A commitment to a state hospital was arranged without revoking probation.

17

A parolee with numerous arrests for drunk and disorderly conduct while under supervision was bringing considerable agitation from the police department for a revocation. The

offender's parole term, however, was very close to reaching the Mandatory Release date. In view of his previous institutional experience, the offender was believed to have attained the "maximum benefits" possible. The parole term was allowed to expire, despite several arrests and jail sentences.

Considered fundamental in the decision to revoke or not to revoke offenders is the extent of potential danger posed by their behavior in the community. Thus it was found that offenders whose behavior was not viewed as particularly dangerous, whose violations were of low visibility or consequence to the community, whose social adjustment was at least marginal, tended not to be revoked when violations became known to the agents.

18

A recently paroled offender, previously convicted of forgery and writing worthless checks, was arrested for illegal possession of beer in a car and for resisting arrest. The agent felt the case prognosis was fairly good, despite these violations, in that the individual held a responsible job, had cooperated well under supervision, and had been in no other difficulties with the law. With twenty-seven months remaining on the latter's parole term, the agent recommended a short county jail sentence for the offenses in place of a revocation of parole.

19

Two recent parolees, both with over two years remaining on parole, were working in a local junk yard where parolees fresh out of institutions were frequently hired for low wages. The two offenders were accused of stealing some merchandise and petty cash from the employer. When the circumstances became known, however, the agent felt the employer had provoked the theft by leaving the parolees in charge of the yard after firing them and refusing to pay them back wages. The case was allowed to go into court, where charges were dismissed upon payment of restitution and costs.

In some cases an indication of change in attitude toward supervision or in cooperating with the supervising agent was sufficient basis for deciding to continue field supervision without revocation.

20

A youth probationer was arrested for a minor offense, formally charged and convicted. The agent felt the incident was directly related to recent family problems, which had resulted in the youth being forced to leave home. From a discussion with the offender, the agent decided an independent living arrangement could be established without risking further violations. A short jail sentence was served for the offense committed, and probation was continued.

II.

NOTE: WISCONSIN CRIMINAL PROCEDURE

1966 Wisconsin Law Review 403, 527-529

3. REVOCATION OF PROBATION AND PAROLE

a. Administrative Procedure and Internal Review

An offender convicted of a felony outside Milwaukee County who is placed on probation or released on parole is in the legal

custody of the Department of Public Welfare.[689] Statutory powers given the department to revoke probation and parole are very broad. Probationers convicted of felonies (outside Milwaukee County) may be brought before the court for sentence. Probationer must be sentenced without further stay, or, if already sentenced, he may be ordered directly to an institution.[690] Parolees may be returned to prison at any time on order of the department.[691] When an agent makes a decision to recommend revocation, the probationer or parolee is placed in custody if he is available and not already in custody. If further investigation by the agent substantiates the decision to recommend revocation, the agent summarizes the reasons for revocation and submits a case history, summary, and recommendation to his district administrator. If the district administrator concurs in the recommendation to revoke, he submits the recommendation to the regional supervisor. If the regional supervisor concurs, the recommendation is submitted to the Director of the Department of Public Welfare. It is the decision by the director to accept the recommendation which makes revocation effective. Upon revocation the offender is returned to prison.

Administrative decisions reversing the recommendation of the revoking agent seldom occur. The theory of corrections places a strong emphasis on the relationship between the individual agent and the parolee. Thus a supervisor would be loath to interfere with the agent's discretion.

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[689] Wis. Stat. §§ 57.01(1), .06(3) (1963).

[690] Wis. Stat. § 57.03(1) (1963) provides that "if a probationer in its charge violates the conditions of his probation, the department may order him brought before the court for sentence which shall then be imposed without further stay or if already sentenced may order him to prison . . . ." On misdemeanors, see Wis. Stat. § 57.04 (1963). On probation in Milwaukee County, see Wis. Stat. § 57.025 (1963).

[691] Wis. Laws 1965, ch. 520, § 6, provides that "a certified copy of the order shall be sufficient authority for any officer to take the prisoner to the institution from which he was paroled . . . ."

The parole board sees all parole violators whose parole has been revoked approximately thirty days after the violator's arrival at the prison.[692] This appearance is a personal one, no representation of the prisoner's interest being allowed at the hearing.[693] The purpose of the hearing is to determine the amount of good conduct time to be forfeited because of violation and to determine the time for the next parole hearing. The grounds for and the propriety of the revocation are in issue, but only to the extent that parole can be reinstated if the board determines that the revocation was unwarranted. However, reinstatement is seldom recommended.

The theory behind the relatively simple revocation procedure in Wisconsin is that probation and parole can be more freely granted and liberally administered if the probationer or parolee can be returned to prison without having to go through a highly formalized adversary proceeding. The department takes the position that if the revocation decision were to be subject to judicial challenge, society's best interests would not be served since the standard for grant would have to be tightened and fewer probations and paroles granted.

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[692] Division of Corrections, Wis. State Dep't of Public Welfare, Parole Board Procedures and Practices 22 (1963).

[693] *Ibid.* Although the manual does not explicitly say so for violator hearings, it does explicitly say so for parole hearings. *Id.* at 16.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1225

JOHN R. GAGNON,

Petitioner,

v.

GERALD H. SCARPELLI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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JOHN R. GAGNON,

Petitioner,

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GERALD H. SCARPELLI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On July 9, 1965, the Respondent entered a plea of guilty to a charge of armed robbery in violation of Section 943.32(1)(b)(2), Wisconsin Statutes, and was sentenced on that date to an indeterminate term of not more than fifteen (15) years at the Wisconsin State Reformatory, Green Bay, Wisconsin by the Honorable HOWARD J. DU ROCHER, County Judge, Branch 2, Racine County, Wisconsin. Execution of the sentence was stayed and Respondent was placed on probation to the State Department of Public Welfare (now known as the Department of Health and Social Services) for a period of seven (7) years.

On July 9, 1965, Respondent signed a "Parole Agreement" and a "Travel Permit and Agreement to Return." He thereupon travelled to Illinois and on August 5, 1965, the Adult Probation Department of the Circuit Court of Cook County, Illinois, accepted Respondent's probation supervision pursuant to the Uniform Act for Out-of-State Parolee Supervision. (Section 57.13, Wisconsin Statutes). The agreement signed by the Respondent provided that he waive extradition to the State of Wisconsin from any jurisdiction in or outside of the United States and that he could not contest any effort by any jurisdiction to return him to the State of Wisconsin. On August 20, 1965, Respondent's probation supervisor recommended to the State Department of Public Welfare that Respondent's probation be revoked by reason of his association with known criminals and his involvement in a burglary. On the same day, the District Administrator concurred in the recommendation, and on August 27, 1965, the Chief Probation and Parole Services made the same recommendation. Pursuant to these recommendations the Director of the State Department of Public Welfare, Wilbur J. Schmidt, entered an order revoking the petitioner's probation on September 1, 1965. The recommendations for revoking probation were based on the transcript of the statement allegedly given by the Respondent on August 5, 1965, to Mr. Robert J. Smart, Assistant States Attorney, Cook County, Illinois, and newspaper clippings from August 6, 1965, edition of the Chicago Tribune pertaining to the occurrence in Deerfield, Lake County, Illinois of a burglary.

Pursuant to the revocation order, the Respondent was picked up in Illinois at his place of employment on September 3 or September 4, 1965, and he was transported to the Sheriff's office, Niles, Illinois. On the

same day, Respondent was transported to the Racine County Jail, Racine, Wisconsin. Respondent was held overnight in the Racine County Jail and on the following day was transported to the Green Bay Reformatory. Respondent was received at the reformatory on September 5, 1965.

Respondent was never afforded a hearing, either by the State Department of Public Welfare or by the sentencing court prior to the revocation of his probation and transportation to the Green Bay Reformatory. Further, he was never granted a hearing of any kind in Illinois after he was picked up and prior to the time he was transported to the Racine County Jail. Respondent was also denied an opportunity to consult with a lawyer of his own choosing or appointed counsel prior to the revocation of his probation, prior to his removal from the State of Illinois to the Racine County Jail, and prior to his transportation to the Green Bay Reformatory.

On June 4, 1969, Respondent was released from incarceration by the State of Wisconsin and was paroled to a federal detainer. Respondent was previously sentenced to a term of eight (8) years on a federal conviction. That sentence was to be served concurrently with the sentence imposed in the State of Wisconsin. At the present time Respondent has been released from the Federal Correctional Institution at Leavenworth, Kansas and his status with regard to the State of Wisconsin is that of parolee.

Inasmuch as Respondent was on July 9, 1965, placed on probation for a period of seven (7) years, that probationary period were the revocation not to have interceded would have expired on July 9, 1972.

This statement of facts is presented as a result of certain exceptions being taken on the part of the

Respondent to the statement of facts presented in Petitioner's brief. Specifically, the Respondent takes exception to the Petitioner's relation of the facts surrounding the alleged involvement of the Respondent in a burglary occurring in Deerfield, Lake County, Illinois on Friday, August 6, 1965. The facts recited by the Petitioner are based entirely upon an account of the burglary appearing in the August 6, 1965 edition of the Chicago Tribune and upon a statement made by the Respondent to Assistant States Attorney Robert J. Smart in the Cook County Jail. The taking of this statement commenced at approximately 3:15 p.m. on August 6, 1965. Respondent while admitting the making of the statement has contended that the statement was made under duress. The Petitioner's characterization of the Respondent's explanation for the making of this statement as well as the Petitioner's characterization of the Respondent's explanation for a cut on the Respondent's hand as improbable explanations is irrelevant and immaterial to the instant proceeding. The Respondent was not convicted of the burglary occurring in Deerfield, Lake County, Illinois, on Friday, August 6, 1965, and charges arising out of the said burglary were dismissed upon Respondent's return to the State of Wisconsin. The Respondent was never convicted of any involvement in this burglary.

Additionally, the Respondent would point out that materials referred to by the Petitioner in his *Facts Relating To The Administration Of Law*, and appearing in the Addendum to Petitioner's brief, are in no way an exhaustive presentation of materials regarding parole and probation revocation proceedings, nor is there any indication, in light of the publication dates of these materials, that they are in any way representative of proceedings now conducted in Wisconsin.

SUMMARY OF ARGUMENT

Respondent would argue that this case should be dismissed in that it is moot as to him. It is a long-recognized doctrine of this Court that the decision of constitutional questions will be avoided if there is any other ground on which the issues presented by a controversy may be decided. In the instant case the Court of Appeals for the Seventh Circuit decided that the holding of *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970) that a probationer facing revocation had a Due Process right to a hearing prior to revocation was applicable to Respondent.See *Gunsolus v. Gagnon*, 454 F.2d 416 (7th Cir. 1971) (this case below). The Court of Appeals' decision that the holding of *Hahn* is applicable to Respondent is not challenged in this action. In fact, the Petitioner concedes that probationers facing revocation are entitled, on the basis of *Morrissey v. Brewer*, U.S. , 92 S.Ct. , 33 L.Ed.2d 484 (1972), to such a hearing. Inasmuch as Respondent was denied a hearing prior to the revocation of his probation, that revocation was illegal regardless of this Court's decision regarding Respondent's right to the assistance of counsel at that hearing. Inasmuch as there is no authority in Wisconsin law providing for the tolling of the probationary period as a result of an illegal revocation and inasmuch as the District Court ordered the record of the revocation expunged from Respondent's record, the seven (7) year probationary period imposed on July 9, 1965, expired as of July 9, 1972 and this case is therefore moot as to the Respondent.

Assuming that this Court should find that the consequences surrounding the revocation of probation are significant enough to mandate the decision of the question presented in this case, it is Respondent's

contention that in light of the reasoning of this Court in its decision, last term, in *Morrissey v. Brewer*, ___U.S.___, 92 S.Ct.___, 33 L.Ed.2d 484 (1972), the revocation of any probation should be accomplished only after the completion of a hearing procedure meeting the minimal standards expressed in *Morrissey*. While *Morrissey* dealt with the revocation of a parole, no significant difference exists between the status of a parolee and that of a probationer, and therefore the procedural safeguards accorded parolees by *Morrissey* should be extended by this Court to probationers.

While the Court in *Morrissey* specifically withheld judgment as to whether or not the right to a hearing prior to revocation included the right to the assistance of counsel at that hearing, Respondent respectfully contends that the granting of a right to a hearing is, in large measure, the granting of a right void of significance unless that hearing includes the right of the probationer facing revocation to the assistance of counsel. A probation revocation hearing involves precisely the kinds of problems which a defendant in a criminal prosecution faces. The revocation hearing is an attempt to reconstruct certain disputed factual situations, the dispute occurring between the probationer and his supervising agent. Clearly, the reasoning in *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), which suggests that there are laymen illiterate and therefore incompetent to protect themselves in the trial of a matter before a Court is just as applicable in the case of a probationer facing an analogous situation in a probation revocation hearing.

This Court very early in its history recognized that the conduct of a hearing without the assistance of a lawyer, trained to develop complex defenses, is often not a hearing at all. In recent years this Court has broadened

the availability of the assistance of counsel from courtroom situations to administrative hearings, and Respondent would contend that the instant case is an appropriate one for this Court to hold that the Due Process Clause of the Fourteenth Amendment requires, minimally, that probationers, prior to revocation, be provided a hearing and as a concomitant right the assistance of counsel at that hearing.

ARGUMENT

I.

AS A CONSEQUENCE OF THE EXPIRATION OF THE ORIGINAL PROBATIONARY PERIOD IMPOSED UPON THE RESPONDENT AND AS THE RESULT OF THE MANNER IN WHICH THE QUESTION PRESENTED TO THIS COURT IS PHRASED, THIS CAUSE IS MOOT AS TO THE RESPONDENT.

Respondent contends that this cause should be dismissed because it is moot as to him. In *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947), this Court discussed the "doctrine of strict necessity" noting that the Court had developed a series of rules for its own governance under which it avoided passing upon most of the constitutional questions raised before it. One of the rules there enumerated indicated that if the record of the case presented a non-constitutional ground upon which the case could be decided, the constitutional question involved in the case would not be adjudicated.

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is

unavoidable. *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 89 L.Ed. 101, 103, 65 S.Ct. 152. It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . *or to decide any constitutional question in advance of the necessity for its decision* . . . * * *' 331 U.S. at 570 (Fn. 34) (Emphasis added)

Respondent was convicted of armed robbery on July 9, 1965 and sentenced to fifteen (15) years imprisonment. The sentence was stayed and he was placed on probation for a period of seven (7) years. On September 1, 1965, after recommendation by the Probation and Parole Services, his probation was revoked without hearing by the State Department of Public Welfare (now known as the Department of Health and Social Services of the State of Wisconsin).

In *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970), it was held that a probationer had a right to a hearing prior to the revocation of his probation. *Gunsolus v. Gagnon*, 454 F.2d 416 (7th Cir. 1971) (this case below) made this right applicable to the Respondent and those probationers similarly situated. Neither the right to a hearing prior to the revocation of probation nor the applicability of the holding in *Hahn v. Burke, supra*, to Respondent is in issue before this Court. In fact, Petitioner concedes in his brief that a probationer is in all likelihood entitled to a hearing prior to revocation of his probation. (Petitioner's Brief, p. 18). The Respondent in this cause was not granted any hearing whatever.

Inasmuch as Respondent was denied his right to a hearing prior to revocation, the revocation by administrative order on September 1, 1965, was illegal and invalid regardless of any decision that this Court might make

regarding the right of Respondent to the assistance of counsel at a probation revocation hearing. Since this Court can decide the issue of counsel adversely to the Respondent and still not effect the propriety of the revocation of his probation, it need not and should not decide the issue of the right to counsel. *Rescue Army v. Municipal Court, supra.*

Moreover, there existing no authority in Wisconsin law for the proposition that the running of Respondent's probationary period was tolled upon the execution of the improper revocation, and the period of Respondent's probation having expired on July 9, 1972, this case is moot. Even assuming that the cause were to be remanded for a revocation hearing without counsel, Respondent could not be compelled to appear at such a hearing. He need only petition the Wisconsin Supreme Court or the District Court for the Eastern District of Wisconsin for his unconditional release from his present status as a parolee of the State of Wisconsin. Substantively this petition could be made on the basis of *Hahn v. Burke, supra,* and the decision of the Wisconsin State Supreme Court in *State ex rel. Johnson v. Cady,* 50 Wis.2d 540, 185 N.W.2d 306 (1970), which adopted the holding of the Court of Appeals for the Seventh Circuit in *Hahn v. Burke,* as the controlling law in the State of Wisconsin with regard to the issue of a hearing prior to the revocation of probation. Neither of these cases, *Hahn* nor *Johnson,* is in issue before this Court. Therefore, Respondent respectfully contends this cause should be dismissed as presenting a moot question in that he is, by lower court decision, guaranteed the right to a hearing prior to revocation, and this Court need not decide the question of Respondent's right to the assistance of counsel at such a hearing.

II.

ASSUMING THIS COURT DECIDES THE QUESTION PRESENTED BY THIS CASE IS NOT MOOT, THE COURT SHOULD EXTEND AND MAKE APPLICABLE TO PROBATIONERS THE HEARING PROCEDURE ESTABLISHED FOR PAROLEES BY *MORRISSEY V. BREWER*, ____ U.S. ____ (1972)–THOSE HEARINGS BEING REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Morrissey v. Brewer*, (1972), this Court held that state correctional authorities seeking the revocation of a parolee's parole were required by the Due Process Clause of the Fourteenth Amendment to provide the parolee with certain procedural safeguards. These constitutionally mandated minima are essentially as follows. The parolee must be given:

> (a) Written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and the reasons for revoking parole. ___ U.S. ___, 33 L.Ed.2d at 499.

Morrissey established, as a minimum, a two stage proceeding intended to fulfill the needs of the state while protecting the "right" of the parolee–his conditional liberty. This is wholly in keeping with the historical application by this Court of the Due Process Clause. In *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960), the Court said:

> 'Due process' is an elusive concept. Its exact boundaries are unidentifiable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly effect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. 363 U.S. at 441.

Mr. Justice Frankfurter, concurring in *Hannah*, also discussed the importance of balancing government and personal interests in arriving at a decision as to what process was due in a given case. He said:

> The precise nature of the interest alleged to be adversely affected or of the freedom of action claimed to be curtailed, the manner in which this is to be done and the reasons for doing it, the balance of individual hurt and the justifying public good—these and such like are the considerations, avowed or implicit, that determine the judicial judgment when appeal is to be made to "Due Process." 363 U.S. at 487-488.

See also *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).

In *Morrissey*, the Court chose to describe this balancing process as follows:

> Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 128, 168, 95 L.Ed. 817, 852, 71 S.Ct. 624 (1951) (Frankfruter, J. concurring), quoted in *Goldberg v. Kelly*, 397 U.S. 254, 263, 25 L.Ed.2d 287, 296, 90 S.Ct. 1011 (1970). The question is not merely the 'weight of the individual's interest, but whether the nature of the interest is one within the contempla-

tion of the 'liberty or property' language of the Fourteenth Amendment. *Fuentes v. Chevin*, 405 U.S.____, 32 L.Ed.2d 556, 92 S.Ct.____ (decided June 12, 1972). ___U.S. at ___, 33 L.Ed.2d at 494.

This Court in *Morrisey* found that the nature of a parolee's interest in his continuation on parole was of such a kind as to be one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment, and consequently the Court held that Morrissey had a right to a hearing prior to revocation.

In the instant case, the Governmental interest and private interests are undistinguishable from the interest this Court had to balance in due process terms in *Morrissey*. The nature of the Respondent's interest in maintaining his status as a probationer is, like Morrissey's, of a kind such as to be within the contemplation of the "liberty or property" language of the Fourteenth Amendment.

This Court in *Morrissey* said:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. * * * Though the state properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in prison. * * * The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. ___U.S. at ___, 33 L.Ed.2d at 494-495.

The above passage is as true of probationers as parolees. In Wisconsin, the very act of placing a man on probation recognizes that the state, via its judiciary, has determined

that future criminal involvement on the part of the probationer is unlikely. (See Section 57.01(1), Wisconsin Statutes (1967), Petitioner's Brief, p. 6). Most importantly, the probationer, like the parolee, relies on at least the implicit promise that revocation will result only upon a violation of the conditions of probation. The probationer thus has a significant, even if only conditional, right or interest in his probationary status, and revocation seriously injures the probationer's right.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959).

The probationer's interest or right in his status as a probationer is injured by an attempt on the State's part to revoke that probation. Consequently, he, like a parolee, should be granted the procedural safeguards insured parolees by the hearing process of *Morrissey v. Brewer*, *supra*.

III.

A PROBATIONER HAS A CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL AT A REVOCATION HEARING.

A. The Right To Counsel Is Among The Most Basic Elements of Due Process

Respondent respectfully contends that the existence of a constitutionally guaranteed right to a hearing prior to the revocation of probation requires as a necessary corollary the right to the assistance of counsel at that

hearing. To grant probationers the right to a hearing prior to revocation while denying them the assistance of counsel would result in the granting of an empty right. The right to be assisted by counsel in proceedings which greatly affect an individual's rights has long been recognized as one of the rights most fundamental to due process of law. As this Court stated in *Holden v. Hardy*, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780 (1898):

> . . . There are certain immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard. 169 U.S. at 389.

This language was relied upon by this Court in *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), in holding that due process of law requires appointment of counsel in a capital case. The Court held that the right to the assistance of counsel:

> Is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' (Citing *Herbert v. State of Louisiana*, 272 U.S. 312, 316). 287 U.S. at 71-72.

Considering the question of what a "hearing" includes the *Powell* Court stated:

> Historically and in practice in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. *The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel.* Even the intelligent and educated layman has small and sometimes no skill in the science of law. * * * He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. * * * If

> in any case, civil or criminal, a state court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and therefore, of due process in the constitutional sense. 287 U.S. at 68, 69. (Emphasis supplied).

Noting that the defendant stood in peril of their lives, the Court in *Powell* examined the nature of the governmental function involved. It noted that defendants were young, ignorant and illiterate. They were being tried in an atmosphere of hostility, under close surveillance by the military, and far away from friends and family. Furthermore, they were imprisoned and thus unable to prepare their defense without counsel. A lawyer was found to be vital for the purposes of consultation, thoroughgoing investigation, and the preparation of a defense. *Powell v. Alabama*, 287 U.S. at 57.

Powell was decided, not upon the basis of the Sixth Amendment guarantee to the assistance of counsel in a criminal prosecution, but rather upon the due process clause of the Fourteenth Amendment. This decision, nevertheless, has become a touchstone for both due process and Sixth Amendment decisions.

Since *Powell*, the right to counsel has been considered essential to a fair trial, and the constitutional availability of counsel has constantly expanded. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), established that the right to counsel was so fundamental that its waiver was required to be clearly determined and noted on the record. The Court stated that the right was:

> . . . Deemed necessary to insure fundamental rights of life and liberty. 304 U.S. at 462.

Ten years after *Powell*, *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), was decided by this Court. Conceding the importance of counsel, it nevertheless determined that the right to the assistance of counsel was not a fundamental right in all cases, but only when counsel was so essential to fairness that appointment was imperative. 316 U.S. at 471. The *Betts* case is important because it severely limited *Powell* to its own facts and expressly held that counsel was not a "natural, inherent, and fundamental" principle of fairness. 316 U.S. at 464. In 1963, *Betts v. Brady* was overruled by *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Court's opinion in *Gideon* made the Sixth Amendment applicable and obligatory on the states and held that an indigent defendant in a serious crime in a state court had the right to have counsel appointed for him. The basis for this decision was the fundamental character of the right to the aid of counsel as set forth in *Powell v. Alabama*, *supra*, which was no longer limited to its particular facts.

B. Since This Court's Decision In Gideon v. Wainwright, The Right To The Assistance of Counsel In Criminal Proceedings Has Been Vastly Expanded Recognizing That This Assistance Is Of Such A Fundamental Nature That It Cannot Be Denied.

After this Court's opinion in *Gideon v. Wainwright*, *supra*, the right to the assistance of counsel as required by the Sixth Amendment was extended beyond the bounds of the trial of a criminal prosecution itself by this Court's decision in *Massiah v. United States* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), which held a defendant was entitled to the assistance of counsel after indictment and release on bail. This period of time was

determined to be a "critical period of the proceedings" within the meaning of that term as found in *Powell v. Alabama, supra.*

The *Massiah*, decision foreshadowed this Court's opinion in *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), wherein the Court held that the right to counsel applied at a pre-indictment police interrogation, and that any incriminating statement made during that interrogation, after the suspect has requested and been denied an opportunity to consult with his lawyer, is excludable at trial. The Court cited *Powell* and *Massiah* in finding this investigatory process to be a critical stage in the proceedings, that is, a stage at which the suspect was most in need of an attorney.

> It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities have served a formal indictment. Petitioner had, for all practical purposes, already been charged with murder. 378 U.S. at 486.

Even though the period between the arrest and indictment of defendant was recognized as the period during which most confessions were obtained and even though this ruling would significantly diminish the number of confessions obtained, the Court held that:

> Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), expanded even further the right to counsel discussed in *Escobedo*. The Court in *Miranda* held that any statements obtained in a police interrogation which were not preceded by a police

warning to the suspect regarding the suspect's constitutional rights with regard to the assistance of counsel would be inadmissible as a violation of the Fifth and Sixth Amendments to the United States Constitution. Not only did the Court direct that an accused be notified of his right to counsel, but it also directed that upon any indication by the accused that he desired to consult with counsel prior to speaking, all interrogation had to cease pending the completion of that consultation.

Kirby v. Illinois, ____ U.S. ____, 92 S.Ct. 1877, ____ L.Ed.2d ____ (1972), the Court, in holding there was not right to counsel at pre-indictment line-ups, distinguished *Escobedo* and *Miranda* and stated that the Sixth and Fourteenth Amendment right to counsel attached "only at or after the time that adversary proceedings have been initiated against the defendant, (citing Powell), and thus the right did not attach prior to the indictment." ____ U.S. at ____.

Although this decision appeared to put a limitation on the right to counsel after it had been expanded to apply at arraignment, *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); on appeal, *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); at preliminary hearings, *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); at post-indictment line-ups, *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); at probation revocation proceedings wherein there was a deferred sentencing, *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); prior to the acceptance of a guilty plea, *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); at a non-essential preliminary hearing, *Coleman v.*

Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); and on a petition for writ of certiorari to this Court, *Doherty v. United States*, ___ U.S. ___, 92 S.Ct. 175, 30 L.Ed.2d 149 (1971), it did not indicate on the part of this Court a retreat from the *Powell* analysis of the right to counsel as a fundamental principle of liberty and justice and as an essential feature of a meaningful hearing. Rather the Court in *Kirby* was concerned primarily with determining the point of commencement of:

> The "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. ___ U.S. at ___.

This Court has recently further expanded the Sixth Amendment right to counsel by holding the assistance of counsel to be essential in any criminal prosecution, whether petty, misdemeanor, or felony, which might result in imprisonment. *Argersinger v. Hamlin*, ___ U.S. ___, 92 S.Ct. ___, 32 L.Ed.2d 530 (1972). In deciding *Argersinger* this Court relied upon *Powell* in describing the fundamental nature of the right to counsel and found that lawyers in criminal courts are necessities and not luxuries. The Court evaluated the interest of the accused in not being deprived of his liberty, even for a short period of time, and stated that the prospect of losing liberty even for a short time would not be viewed by an accused as a trivial matter. The Court weighed the accused's interest in this loss of liberty against the burden upon the Government of providing counsel. It reasoned that there were sufficient numbers of lawyers and law students available to satisfy the estimated requirement of 1575 to 2300 full time counsel.

Mr. Chief Justice Burger in his concurrence expressed concern with the burden on the states, but he found the individual interest involved and the critical function of counsel at criminal trials to outweigh that burden.

> Yet several cogent factors suggest the infirmities in any approach that allows confinement for any period without the aid of counsel at trial; any deprivation of liberty is a serious matter. The issues that must be dealt with in a trial for a petty offense or misdemeanor may often be simpler than those involved in a felony trial, and yet be beyond the capability of a layman, especially when he is opposed by a law trained prosecutor . . . ___U.S. at ___. (Mr. Chief Justice Burger, concurring)

This most recent construction of the Sixth Amendment by the Court and the resultant greater availability of the assistance of counsel reaffirms the principle enunciated by this Court in *Powell* that the right to counsel is fundamental to due process of law, under both the Sixth and Fourteenth Amendments. As the Court in *Powell* stated:

> The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' (*Herbert v. Louisiana*, 272 U.S. 312, 316, 71 L.Ed. 270, 272, 48 ALR 1102, 47 S.Ct. 103) is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, *although it be specifically dealt with in another part of the federal Constitution*, 287 U.S. at 67. (Emphasis supplied.)

Thus, the right to counsel is a right provided by the Due Process Clause of the Fourteenth Amendment, independent of the express guarantee of the Sixth Amendment, and counsel was deemed required under that clause until *Gideon v. Wainwright*, *supra*, held the Sixth Amendment applicable to the states. Although the

cases subsequent to *Gideon* have dealt primarily with the Sixth Amendment right and have continuously expanded that right, there existed prior to *Powell* and there exists today a Fourteenth Amendment right to counsel in non-criminal proceedings.

C. The Due Process Right To The Assistance Of Counsel Extends To Civil And Administrative Proceedings.

The right to counsel has been extended, under the Due Process Clause of the Fourteenth Amendment, to juvenile court proceedings–proceedings which are civil in nature.

In *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), this Court held that when jurisdiction over a juvenile is waived from juvenile to adult court, the juvenile must be provided a hearing, the effective assistance of counsel, and a statement of reasons for the waiver. The Court did not require that the hearing provide:

> All of the requirements of a criminal trial or even of the usual administrative hearing, but we do hold that the hearing must measure up to the essentials of due process and fair treatment. 383 U.S. at 562.

It is significant that the right to counsel was considered one of the "essentials of due process."

The right of counsel was considered fundamental to another juvenile, civil proceeding–the adjudication of delinquency. In *Application of Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), this Court found that where the threatened loss of liberty is comparable in severity to the loss of liberty occasioned by a felony prosecution, a juvenile requires the assistance of counsel:

> To cope with problems of law, and to make skilled inquiry into the facts, to insist upon regularity of

> the proceeding, and to ascertain whether he has a defense and to prepare and submit it. 387 U.S. at 36.

The Court then held that the child and his parents were to be advised of his right to be represented by retained or appointed counsel.

Similarly, where a child is charged with an act which renders him liable to imprisonment for as long as six years, due process demands that his guilt be proved beyond a reasonable doubt, just as it requires that he be granted the assistance of counsel. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The right to counsel has long been found necessary in deportation proceedings which are, despite the severe loss to the alien imposed by deportation, considered administrative in nature. The General Counsel for the Immigration and Naturalization Service has stated that:

> The right to be represented by counsel is one of the most important elements of due process of law. 1 Gordon and Rosenfield, *Immigration Law and Procedure*, Section 1.23.

And the Immigration and Nationality Act of 1952 now provides the right to counsel in proceedings adjudicating excludability or deportability.[1]

The fundamental nature of the right to be represented by counsel in administrative proceedings was recognized

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[1] "In any exclusion or deportation proceedings before a special injury officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. Section 1362.

in the Administrative Procedure Act of 1946, 5 U.S.C. Section 551, et seq. This Act, which applies with certain exceptions to all federal agency proceedings, provides that each person compelled to appear before any agency is entitled to be represented by counsel. It also provides such right to any party who appears in an agency proceeding though not compelled to do so. See 5 U.S.C. Section 551 and 5 U.S.C. Section 555(b).

The most recognition of the right to counsel in administrative proceedings is *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), wherein this Court held the right to exist in state administrative proceedings terminating welfare benefits. The Court there quoted *Powell v. Alabama, supra*, and stated:

> We do not say that counsel must be provided at the pretermination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. 397 U.S. at 270.

Thus, the due process right to the assistance of counsel has been recognized to exist in a number of non-criminal administrative proceedings.

D. The Due Process Right To The Assistance Of Counsel Applies To Adjudicatory Administrative Proceedings.

The right to the assistance of counsel is not an essential one in all administrative proceedings. The test by which it is determined whether fundamental due process rights apply to administrative proceedings was enunciated by this Court in *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960). The Court, noting that due process is an elusive and flexible concept, stated:

> Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. 363 U.S. at 442.

The Court found a purely investigative non-adjudicatory proceeding by the United States Civil Rights Commission not to require the right of confrontation and cross-examination or notice of the identity of persons making complaints to the commission. The function of the Civil Rights Commission was described as:

> Purely investigative and fact finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make any determinations, depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal right. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action. 363 U.S. at 441.

Even though the Commission's investigation as to whether voting registrars in the South had practiced racial discrimination might result in those registrars suffering approbrium and scorn, the loss of their jobs, and the threat of criminal prosecution, those consequences were found to be purely conjectural.

However, even if such collateral consequences were to flow from the Commission's investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function. 363 U.S. at 443.

In contrast, this Court determined that due process required the right to confrontation and cross-examination and the right to present evidence in adjudicative investigations conducted by the Louisiana Labor Management Commission of Inquiry. *Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). Although the Act under which the Commission operated was drafted with *Hannah v. Larche* in mind, and the structure and powers of the Commission were similar to those of the Civil Rights Commission, the adjudicative nature of the Louisiana commission compelled the providing of fundamental due process rights.

> It is true . . . that the commission does not adjudicate in the sense that a Court does, nor does the commission conduct, strictly speaking, a criminal proceeding. Nevertheless, the Act, when analyzed in light of the allegations of the complaint, makes it clear that the commission exercises a function very much akin to making an official adjudication of criminal culpability . . . In short, the commission very clearly exercises an accusatory function; it is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws of Louisiana and the United States and to brand them as criminals in public. 395 U.S. at 427-428.[2]

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[2]The Court did not decide whether there need by provided meaningful rules of evidence, standards of guilt or innocence, and effective assistance of counsel, leaving those issues to the District Court on remand. It is noteworthy that there was already a limited right to counsel.

Consequently, the Court found that the procedures of the Commission did not meet the minimal requirements made obligatory on the states by the Due Process Clause of the Fourteenth Amendment. 395 U.S. at 428.

The functions of a probation and parole board in probation revocations under the standards set out in *Morrissey v. Brewer*, ___ U.S. ___, 92 S.Ct. ___, 33 L.Ed.2d 484 (1972), are much more like those in the *Jenkins* case, *supra*, than those in *Hannah v. Larche*, *supra*. The board is adjudicative in nature. In the case of Respondent, it makes determinations as to whether he associated with known criminals and whether he was involved in a burglary. On the basis of these determinations, it can remand him to his probationary status or revoke that status. If it revokes, it takes from him his conditional liberty, sending him to prison for a period of fifteen (15) years. The Parole Board, therefore, makes determinations depriving Scarpelli of liberty. It issues orders. It imposes legal sanctions, and it takes affirmative action affecting an individual's legal rights. It is not limited to findings of fact "which may subsequently be used as a basis for legislative or executive action." *Hannah v. Larche*, 363 U.S. at 441. The Board "exercises a function very much akin to making an official adjudication of criminal culpability," *Jenkins v. McKeithen*, 395 U.S. at 427-428, in that it determines whether Scarpelli has been involved in a burglary and on the basis of that determination orders a return to prison. This adjudicatory function was acknowledged and described by the American Bar Association Project on Standards for Criminal Justice when it specifically required representation by retained or appointed counsel in any probation revocation proceeding. *Standards Relating to Probation*, Section 5.4(a)(ii). In its Commentary to this section, the Committee report stated:

> The central task of ascertaining whether the prisoner has committed the acts alleged, and measuring the acts proven against the standard to which he was obliged to conform is precisely the business of the criminal trial itself where the right to the assistance of counsel has been recognized as one of the "immutable principles of justice." Indeed, it may in many contested revocation proceedings, the conduct charged actually constitutes the commission of a criminal act . . . [I]t would seem patently at war with the central concept of procedural justice to deny to a person with his liberty at stake the opportunity to hear and meet the specific charge against him with the benefit of counsel. *Commentary*, Section 5.4(a)(ii), *Standards Relating to Probation*, at p. 68.

In view of this function, it is clear that the Due Process Clause requires that a probationer, compelled to appear before the Board, be provided with counsel under the rationale of *Hannah v. Larche, supra*, and *Jenkins v. McKeithen, supra.*

IV.

THE RIGHT TO THE ASSISTANCE OF COUNSEL IS AN ESSENTIAL ELEMENT OF DUE PROCESS OF LAW IN PROBATION REVOCATION PROCEEDINGS.

It has frequently been stated that the concept of due process is flexible and not a technical conception with a fixed content.

> Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in

> insuring fundamental justice, it is also a living principle, not confined to past instances. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 173-174, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Mr. Justice Frankfurter, concurring.)

In determining a proper application of the Due Process Clause in a particular situation it is necessary that an examination be made as to whether or not an individual will be "condemned to suffer a grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. at 168, as well as an examination of the "precise nature of the governmental function involved . . .' *Cafeteria and Restaurant Workers Union v. McElroy*, 376 U.S. at 895. Having once examined and determined the governmental function involved as well as the private interest effected it is necessary to arrive at a proper balancing of those factors. In *Morrissey v. Brewer, supra*, this Court found that a grieyous loss was present in the loss of a parolee's conditional liberty. Against this interest of the individual in retaining his liberty as well as society's interest in his rehabilitation and fair treatment, this Court balanced the State's:

> . . . Overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole. ___ U.S. at ___, 33 L.Ed.2d at 495.

Overwhelming as this interest is, the State has no interest in revoking parole without some informal procedural guarantees which will "assure the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." 33 L.Ed.2d 495.

Applying this same rationale to the facts presented by this case, the necessity for retained or appointed counsel at probation revocation hearings becomes evident.

A. The Private Interest Affected by Governmental Action.

As this Court held in *Morrissey v. Brewer, supra,* the termination of parole inflicts a grevious loss on the parolee and often on others.

> . . . The liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. 33 L.Ed.2d at 495.

As discussed in Section II above, probation is like parole and frequently a probationer enjoys a freedom even less restricted than that of a parolee. The revocation of either status results in grievous loss sufficiently serious to require minimal procedural safeguards. One of the most fundamental of these safeguards is the right to the assistance of counsel.

Under the analysis of *Cafeteria and Restaurant Workers Union v. McElroy, supra,* therefore, the probationer has an interest in not losing his liberty, however conditional. Society has an interest, as it does with the parolee, in "restoring him to normal and useful life within the law" and in preventing revocation "because of erroneous information or because of an erroneous evaluation of the need to revoke (probation) given the breach of (probation) conditions." *Morrissey v. Brewer,* ___ U.S. at ___, 33 L.Ed.2d at 496.

B. The Nature of the Governmental Function Involved.

Considering the adjudicative nature of the governmental function, it is in enhancing the integrity of the fact finding process that counsel becomes essential, both to protect the individual faced with grievous loss and to protect the interest of society. *Miranda v. Arizona, supra*, 384 U.S. at 466-470.

It is most difficult to accept Petitioner's assertion that:

> It is a fact of life that no probationer or parolee is recommended for revocation unless he did the things alleged against him. This is because the probation or parole agent is so strongly motivated against revocation that he does not recommend it unless he is sure, . . . Petitioner's Brief, p. 40.

As stated above, revocation proceedings are adversary proceedings in that, at least where contested, a factual determination must be made and a determination is best made where in-put is available from both the agent recommending revocation and from the probationer challenging that recommendation. To rest the continuance of or the denial of a probationer's freedom solely on the basis of a probation agent's good will or good intentions is a very dangerous proposition. The danger of permitting uncontestable administrative action is highlighted by this Court's recitation of a portion of the District Court opinion in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The District Court said:

> [T]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him

so that he may contest its basis and produce evidence in rebuttal. 294 F.Supp. at 904-905. 397 U.S. at 266.

The Court in *Goldberg* found not only that the hearing was required to protect recipients from unjust administrative action but found the right to the assistance of retained counsel to be a right guaranteed recipients facing termination.

In *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), the Court discussed the need for confrontation and cross-examination.

> ... The evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. 360 U.S. at 496.

Discussing the actions of a school board in expelling certain students who had participated in a mass protest the Fifth Circuit Court of Appeals said:

> By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of facts concerning the charged misconduct easily colored by the point of view of the witnesses. *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158 (5th Cir. 1961).

Counsel's value then in a probation revocation proceeding lies in his ability to marshal the facts, introduce evidence or mitigating circumstances and in general aid and assist

the probationer to present his case. See *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). *Menechino v. Warden*, 27 N.Y. 376, 21 N.Y.S.2d 449 (1970); *United States ex rel. Bey v. Connecticut State Board of Parole*, 443 F.2d 1079 (2nd Cir. 1971); *ABA Standards Relating to Probation*, Section 5.4(a)(ii), *Commentary; Ahern v. Board of Education, School District of Grand Island*, 456 F.2d 399 (8th Cir. 1972); *Warren v. Michigan Parole Board*, 23 Mich. App. 754, 179 N.W.2d 664 (1970) and *Williams v. Patterson*, 389 F.2d 374 (10th Cir. 1968).

The reasoning of Mr. Justice Sutherland in *Powell v. Alabama, supra*, is as appropriate and valid in the present day in a probation revocation setting as it was then, and truly as it has been since the legal system in this country was initiated. For just as the right to be heard would have been of little avail in 1932 in a hostile courtroom in Alabama without the assistance of counsel, that right is of little avail in this day in a revocation proceeding unless the right to counsel is guaranteed. Just as there were ignorant and illiterate and feeble-minded men in 1932, there are ignorant, illiterate and feeble-minded men in 1972. It has always been recognized that:

> A lawyer's training particularly suits him to analyze and organize for the benefit of an impartial tribunal evidentiary matter bearing on the occurrence or non-occurrence, as well as the significance, of past events. See *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). *United States ex rel. Bey v. Connecticut State Board of Parole*, 443 F.2d 1079, 1087 (2nd Cir. 1971).

The Court in *Bey* discussed the value of a trained lawyer to a parolee facing revocation. The Court said:

A trained lawyer might well have discovered mitigating circumstances and hidden significances not revealed or immediately obvious on the face of Mercer's report. For example, the Board might well have welcomed the suggestion for a fuller investigation of Bey's alleged announced intent to depart the state or his oblique threat to repeat his past crimes. Perhaps Bey's employers could have supplied useful information as to Bey's dependability and thoroughness on the job. A review of Bey's reported letters to Porter School girl students might have revealed different hues and motivation than found their way into Mercer's report.

Thus, at the least, a diligent lawyer representing Bey before the Parole Board might have investigated the decisive events of Bey's brief period of release and in an orderly, disciplined presentation to the Board, have attempted to establish facts more favorable to Bey than those presented by Mercer and McIlduff and have suggested their relevance to the four alternatives less severe than revocation available to the Board in disposing of Bey's case. 443 F.2d at 1088.

Had the Respondent in the instant case been granted the right to the assistance of counsel at a revocation hearing, the lawyer could have analyzed the factual occurrences upon which the recommendation of the Respondent's supervising agent were based and the lawyer could have marshalled the facts involved and presented the occurrences in a light more favorable to the Respondent than that found in the recommendation of the supervising agent. Additionally, a lawyer could have discovered mitigating circumstances which might have weighed heavily in the final decision of the Department of Public Welfare as to whether to revoke or not. An attorney is obviously better suited as a result of his

training and his daily involvement in contentious matters to effectively present a case before the supervising authority than is a probationer overwhelmed by the administrative agency.

> The fact that the Board performs a predictive and prognostic function does not depreciate the importance of accurate factual exposition and evaluation. *Bey*, 443 F.2d at 1088.

This is especially true if the probationer has little intelligence or education, *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct 747, 21 L.Ed.2d 718 (1969), or is already incarcerated prior to the final decision upon his revocation. Such incarceration makes it all but impossible for the probationer to prepare his defense without the aid of counsel, and it is a factor which has been raised by this Court in both *Powell v. Alabama, supra*, and *Johnson v. Zerbst, supra*, and recognized as compelling the assistance of counsel. The Respondent was incarcerated while the Department reviewed his probation agent's recommendation to revoke probation.

Given the adjudicative nature of the governmental function, counsel is essential to protect the interests of the probationer against the grievous loss of incarceration for a number of years as well as to further the societal interest of preventing the revocation based upon erroneous information. Society, as was recognized in *Morrissey v. Brewer, supra*, has an interest in treating the probationer and the parolee with basic fairness and thereby increasing the likelihood of rehabilitation. The societal interests are of course shared by the state, which has a further interest in preventing erroneous probation revocations—the great financial cost of keeping a man in prison. Warren, *Probation in the Federal System of Criminal Justice*, 19 Fed. Prob. 3 (Sept. 1955); *Annual*

Report, Ohio Adult Parole Authority, 1964/65 at 13-14; *Note, Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.Univ. Law Review, 702, 705-707 (1963). (All cited in *Morrissey v. Brewer*)

C. The Burden On Government of Providing The Right to Counsel.

Against the interests discussed above is balanced the state's interest in revoking probation and imposing the prison sentence without a new criminal trial and in conducting its revocation proceedings with minimal expense and administrative inconvenience. To suggest, as the Petitioner does, however, that the question presented here can or should be answered on the basis of economic effect is unjustifiable. The right to be infringed–the loss of freedom–even if only conditionally granted, cannot be valued monetarily. In *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939), Mr. Justice Stone, concurring, said:

> There are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money valuation. . . . 307 U.S. at 529.

The right to the assistance of counsel in probation revocation hearings may not be as conspicuous a right, but it, like freedom of speech and assembly, cannot be measured in terms of a mill rate, as Petitioner suggests. This Court has held that in the welfare context, the governmental interests of expense and administrative inconvenience are not overriding when balanced against the individual right and that the state had the capacity to reduce costs and administrative burdens.

Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled

> with the state's interest that his payments not be erroneously terminated, clearly outweighs the state's compelling concern to prevent any increase in its fiscal and administrative burdens. *Goldberg v. Kelly*, 397 U.S. at 266.

Similarly, the probationer's interest in retaining his liberty coupled with the state's interest that he not be erroneously incarcerated, clearly outweigh the state's competing interest in minimizing fiscal and administrative burdens.

It should be noted that the State of Wisconsin has, since the summer of 1972, provided juveniles in parole revocation proceedings with the right to counsel, *State ex rel. Bernal v. Hershman*, 54 Wis.2d 626, 196 N.W.2d 72 (1972), and the State of Wisconsin has also extended the right of probation revocation hearings with counsel to adults. *Oestrich v. State*, 55 Wis.2d 222, 198 N.W.2d 664 (1972).

A lawyer's participation in probation revocation need not impede the flow of relevant information to the Board, inasmuch as the reviewing official can control the proceedings and prohibit dilatory or distracting tactics.

> Counsel's proper role is to *assist* the Board, not to impede it, and the Board may take appropriate measures to assure that counsel appreciates his limited role and presents his client's case accordingly. *Bey*, 443 F.2d at 1089.

There has never been demonstrated that the provision of more rights in revocation proceedings, whether probation or parole, results in fewer paroles being granted. Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J.Crim.L.C. and P.S. 174, 175, 194, Note 157 (1964). Nor will the right to counsel introduce friction into the probationer-probation agent

relationship, which is already near an end when the officer recommends revocation. To suggest that a probation agent recommending revocation and the probationer are seeking the same end seems naive at best. They are adversaries and the probation agent as an adversary has the whole weight of the supervising agency behind him. The probationer, on the other hand, is alone and needs the assistance of counsel to effectively vindicate his right before that agency.

CONCLUSION

Should this Court determine that the question presented in this case is not moot, it is respectfully submitted that the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

Dated at Milwaukee, Wisconsin the 26th day of October, 1972.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1225

JOHN R. GAGNON, Warden,
Petitioner,

-v-

GERALD H. SCARPELLI,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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JOHN R. GAGNON, Warden,
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REPLY BRIEF FOR PETITIONER

The Case Is Not Moot.

A. Respondent's period of probation was tolled and has not been running since the date of violation.

Respondent argues that because a period of seven years since probation was imposed on July 9, 1965, has expired, therefore respondent's probation time is up and the state agency is no longer in a position to hold a hearing.

In the first place, the respondent's major premise is incorrect. Sec. 57.072, Wis. Stats., provides, and provided at the time of respondent's conviction, that,

> "[t]he period of probation or parole ceases running upon the offender's * * * committing a crime or some other violation of the terms of his probation or parole which is sufficient in the opinion of * * * the department to warrant revocation of probation or parole. It remains tolled until the happening of one of the following events: Receipt of the offender at the penal institution to which he has been sentenced or from which he has been paroled; in cases supervised by the department, reinstatement of the offender's parole or probation by order of the department; * * *. The date of the order of reinstatement is the date on which the period of probation or parole again begins to run."

Clearly, respondent has not been on probation during the past seven years, whether or not the order of revocation was a valid one. For a considerable part of that time he was in prison serving his sentence in Wisconsin and thereafter he was on parole during which he served a federal prison term. If it is necessary that he be given a probation revocation hearing by reason of this Court's 1972 decision in *Morrissey v. Brewer*, 92 S.Ct. 2593, 40 U.S.L.W. 5016, it will relate back to the time of the violation which was August 5, 1965.

There is no reason for a claim of bad faith or laches on the part of the state agency. When the probation was revoked without a hearing it was done pursuant to existing law which was constitutional under the holding of this Court in *Escoe v. Zerbst* (1935), 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 156. This proceeding was commenced by a petition for a writ of habeas corpus on December 16, 1968, to which a response was promptly filed on January 3, 1969. It took until September 21, 1970, for the decision of the district

court, from which an appeal was promptly taken on October 9, 1970. The court of appeals decision was not filed until December 28, 1971, and this petition for certiorari was promptly filed on March 25, 1972, and was granted June 26, 1972.

Other cases raising the same issue may have become moot by expiration of sentence, but in this case the sentence is fifteen years which still has many years to run.

It should also be pointed out that up until the decision in *Morrissey v. Brewer, supra,* the question whether due process requires a hearing at all was a serious issue in this case and even now the question of what to do about hearings in cases supervised out-of-state under the Interstate Compact is being submitted by petitioner for clarification by this Court.

B. The state agency is entitled to an opportunity to correct its ex post facto constitutional error if it made one, even if the probationary period were to be considered to have run.

It is elementary that relief on federal habeas corpus is not limited to the outright discharge of the prisoner. 28 U.S.C. §2243 provides in part that the court shall "dispose of the matter as law and justice require." Therefore, the doctrine of comity which, through the rule of exhaustion of state remedies, requires that the state have an opportunity to correct federal constitutional errors *before* action in the federal courts (See *Darr v. Burford* (1950), 339 U.S. 200, 204-205, 70 S.Ct. 587, 94 L.Ed. 761) has also been applied by this Court to require that *after* federal habeas corpus the state courts have an opportunity to correct their

errors through state proceedings. *Jackson v. Denno* (1964), 378 U.S. 368, 396, 84 S.Ct. 1774, 12 L.Ed. 2d 908; *Dowd v. United States ex rel. Cook* (1951), 340 U.S. 206, 209-210, 71 S.Ct. 262, 95 L.Ed. 215.

Apropos of the present case, it will be observed that in *Dowd v. United States ex rel. Cook, supra,* the matter was remanded with instructions to give the state an opportunity to afford the habeas petitioner a late appeal of his conviction, even though the state supreme court had held that time for an appeal of right had expired, and had previously denied a discretionary late appeal.

Respectfully submitted,

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WILLIAM A. PLATZ
Assistant Attorney General

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I the undersigned, a member of the bar of this court, do hereby certify that on January , 1973, I duly mailed three copies of the Reply Brief for Petitioner to counsel for the respondent, addressed as follows:

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GAGNON, WARDEN *v.* SCARPELLI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71-1225. Argued January 9, 1973—Decided May 14, 1973

Respondent, a felony probationer, was arrested after committing a burglary. He admitted involvement in the crime but later claimed that the admission was made under duress and was false. The probation of respondent, who was not represented by an attorney, was revoked without a hearing. After filing a habeas corpus petition, he was paroled. The District Court concluded that revocation of probation without hearing and counsel was a denial of due process. The Court of Appeals affirmed. *Held:*

1. Due process mandates preliminary and final revocation hearings in the case of a probationer under the same conditions as are specified in *Morrissey* v. *Brewer*, 408 U. S. 471, in the case of a parolee. Pp. 3–4.

2. The body conducting the hearings should decide in each individual case whether due process requires that an indigent probationer or parolee be represented by counsel. Though the State is not constitutionally obliged to provide counsel in all cases, it should do so where the indigent probationer or parolee may have difficulty in presenting his version of disputed facts without the examination or cross-examination of witnesses or the presentation of complicated documentary evidence. Presumptively, counsel should be provided where, after being informed of his right, the probationer or parolee requests counsel, based on a timely and colorable claim that he has not committed the alleged violation or, if the violation is a matter of public record or uncontested, there are substantial reasons in justification or mitigation that make revocation inappropriate. Pp. 5–13.

3. In every case where a request for counsel is refused, the grounds for refusal should be stated succinctly in the record. P. 13.

454 F. 2d 416, affirmed in part, reversed in part, and remanded.

Syllabus

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a statement dissenting in part.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1225

John R. Gagnon, Warden, Petitioner, *v.* Gerald H. Scarpelli.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May 14, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the related questions whether a previously sentenced probationer is entitled to a hearing when his probation is revoked and, if so, whether he is entitled to be represented by appointed counsel at such a hearing.

I

Respondent, Gerald Scarpelli, pleaded guilty in July, 1965, to a charge of armed robbery in Wisconsin. The trial judge sentenced him to 15 years' imprisonment, but suspended the sentence and placed him on probation for seven years in the custody of the Wisconsin Department of Public Welfare ("the Department").[1] At that time, he signed an agreement specifying the terms of his probation and a "Travel Permit and Agreement to Return" allowing him to reside in Illinois, with supervision there

[1] The Court's order placing respondent on probation provided, among other things, that "[i]n the event of his failure to meet the conditions of his probation he will stand committed under the sentence all ready [*sic*] imposed." App., p. 10. The agreement specifying the conditions of the probation, duly executed by respondent, obligated him to "make a sincere attempt to avoid all acts which are forbidden by law . . . ." App., p. 12.

under an interstate compact. On August 5, 1965, he was accepted for supervision by the Adult Probation Department of Cook County, Illinois.

On August 6, respondent was apprehended by Illinois police, who had surprised him and one Fred Kleckner, Jr., in the course of the burglary of a house. After being apprised of his constitutional rights, respondent admitted that he and Fleckner had broken into the house for the purpose of stealing merchandise or money, although he now asserts that his statement was made under duress and is false. Probation was revoked by the Wisconsin Department on September 1, without a hearing. The stated grounds for revocation were that:

> "1. [Scarpelli] has associated with known criminals, in direct violation of his probation regulations and his supervising agent's instructions;
>
> "2. [Scarpelli] while associating with a known criminal, namely Fred Kleckner, Jr., was involved in, and arrested for, a burglary . . . in Deerfield, Illinois." App., p. 20.

On September 4, 1965, he was incarcerated in the Wisconsin State Reformatory at Green Bay to begin serving the 15 years to which he had been sentenced by the trial judge. At no time was he afforded a hearing.

Some three years later, on December 16, 1968, respondent applied for a writ of habeas corpus. After the petition had been filed, but before it had been acted upon, the Department placed respondent on parole.[1] The District Court found that his status as parolee was sufficient custody to confer jurisdiction on the court and that the

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[1] Respondent was initially paroled to a federal detainer to serve a previously imposed federal sentence arising from another conviction. He was subsequently released from federal custody, but remains a parolee under the supervision of the Department.

petition was not moot because the revocation carried "collateral consequences," presumably including the restraints imposed by his parole. On the merits, the District Court held that revocation without a hearing and counsel was a denial of due process. 317 F. Supp. 72 (ED Wis. 1970). The Court of Appeals affirmed, *sub nom. Gunsolus* v. *Gagnon*, 454 F. 2d 416 (CA7 1971), and we granted certiorari. 408 U. S. 921 (1972).

II.

Two prior decisions set the bounds of our present inquiry. In *Mempa* v. *Rhay*, 389 U. S. 128 (1967), the Court held that a probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing. Reasoning that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," 389 U. S., at 134, and that sentencing is one such stage, the Court concluded that counsel must be provided an indigent at sentencing even when it is accomplished as part of a subsequent, probation revocation proceeding. But this line of reasoning does not require a hearing or counsel at the time of probation revocation in a case such as the present one, where the probationer was sentenced at the time of trial.

Of greater relevance is our decision last Term in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972). There we held that the revocation of parole is not a part of a criminal prosecution.

> "Parole arises after the end of the criminal prosecution, including imposition of sentence. . . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." 408 U. S., at 480.

Even though the revocation of parole is not a part of the criminal prosecution, we held that the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process. Specifically, we held that a parolee is entitled to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision.

Petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one.[3] Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty.[4] Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey* v. *Brewer*, *supra*.[5]

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[3] Despite the undoubted minor differences between probation and parole, the commentators have agreed that revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole. See, *e. g.*, Van Dyke, Parole Revocation Hearings in California: The Right to Counsel, 59 Calif. L. Rev. 1215, 1241–1243 (1971); Sklar, Law and Practice in Probation and Parole Revocation Hearings, 55 J. Crim. L. C. & P. S. 175, 198 n. 182 (1964).

[4] It is clear at least after *Morrissey* v. *Brewer*, *supra*, that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe* v. *Zerbst*, 295 U. S. 490, 492 (1935), that probation is an "act of grace."

[5] Petitioner argues in addition that the *Morrissey* hearing requirements impose serious practical problems in cases such as the present one in which a probationer or parolee is allowed to leave the convicting State for supervision in another State. Such arrangements are made pursuant to an interstate compact adopted by all of the States, including Wisconsin. Wis. Stat. Ann. § 57.13. Petitioner's

III

The second, and more difficult, question posed by this case is whether an indigent probationer or parolee has a due process right to be represented by appointed counsel at these hearings.[8] In answering that question, we draw heavily on the opinion in *Morrissey*. Our first point of reference is the character of probation or parole. As noted in *Morrissey* regarding parole, the "purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able . . . ." 408 U. S., at

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brief asserts that as of June 30, 1972, Wisconsin had a total of 642 parolees and probationers under supervision in other States and that incomplete statistics as of June 30, 1971, indicated a national total of 24,693 persons under out-of-state supervision. Petitioner's Brief, pp. 21–22.

Some amount of disruption inevitably attends any new constitutional ruling. We are confident, however, that modification of the interstate compact can remove without undue strain the more serious technical hurdles to compliance with *Morrissey*. An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the *Morrissey* requirements.

[8] In *Morrissey* v. *Brewer*, *supra*, we left open the question "whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent." 408 U. S., at 489. Since respondent did not attempt to retain counsel but asked only for appointed counsel, we have no occasion to decide in this case whether a probationer or parolee has a right to be represented at a revocation hearing by retained counsel in situations other than those where the State would be obliged to furnish counsel for an indigent.

477. The duty and attitude of the probation or parole officer reflect this purpose:

> "While the parole or probation officer recognizes his double duty to the welfare of his clients and to the safety of the general community, by and large concern for the client dominates his professional attitude. The parole agent ordinarily defines his role as representing his client's best interests as long as these do not constitute a threat to public safety."[1]

Because the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation.

In *Morrissey*, we recognized that the revocation decision has two analytically distinct components:

> "The first step in a revocation decision involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?" *Morrissey* v. *Brewer*, *supra*, 408 U. S., at 479–480.[2]

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[1] Remington, Newman, Kimball, Melli & Goldstein, Criminal Justice Administration, Materials and Cases 910–911 (1969).

[2] The factors entering into these decisions relate in major part to a professional evaluation, by trained probation or parole officers, as to the overall social readjustment of the offender in the community, and include consideration of such variables as the offender's relationship toward his family, his attitude toward the fulfillment

The parole officer's attitude toward these decisions reflects the rehabilitative rather than punitive focus of the probation/parole system:

> "Revocation . . . is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent *never* to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail." [9]

But an exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation. Even though the officer is not by this recommendation converted into a prosecutor committed to convict, his role as counsellor to the probationer or parolee is then surely compromised.

When the officer's view of the probationer's or parolee's conduct differs in this fundamental way from the latter's own view, due process requires that the difference be resolved before revocation becomes final. Both the pro-

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of financial obligations, the extent of his cooperation with the probation officer assigned to his case, his personal associations, and—of course—whether there have been specific and significant violations of the conditions of the probation. The importance of these considerations, some factual and others entirely judgmental, is illustrated by a Wisconsin empirical study which disclosed that, in the sample studied, probation or parole was revoked in only 34.5% of the cases in which the probationer or parolee violated the terms of his release. S. Hunt, The Revocation Decision: A Study of Probation and Parole Agent's Discretion 10 (unpublished thesis on file at the library of the University of Wisconsin) (1964), cited in Petitioner's Brief, Addendum, p. 106.

[9] Remington, Newman, Kimball, Melli & Goldstein, *supra* n. 7, at 910.

bationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion, the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

It was to serve all of these interests that *Morrissey* mandated preliminary and final revocation hearings. At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. *Morrissey* v. *Brewer*, *supra*, 408 U. S., at 487. The final hearing is a less summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause, but the "minimum requirements of due process" include very similar elements:

> "(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking [probation or] parole." *Morrissey* v. *Brewer*, *supra*, 408 U. S., at 489.

These requirements in themselves serve as substantial protection against ill-considered revocation, and petitioner argues that counsel need never be supplied. What this argument overlooks is that the effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

By the same token, we think that the Court of Appeals erred in accepting respondent's contention that the State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases. While such a rule has the appeal of simplicity, it would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel. In most cases, the probationer or parolee has been convicted of committing another crime or has admitted the charges against him.[10] And while in some cases he may have a justifiable excuse for the violation or a convincing reason why revocation is not the appropriate disposition, mitigating evidence of this kind is often not susceptible of proof or is so simple as not to require either investigation or exposition by counsel.

The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the

[10] See Sklar, *supra* n. 3, at 192 (parole), 193 (probation).

State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in *Morrissey* as being "predictive and discretionary" as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate rather than continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.[11]

In some cases, these modifications in the nature of the revocation hearing must be endured and the costs borne because, as we have indicated above, the probationer's or parolee's version of a disputed issue can fairly be represented only by a trained advocate. But due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.

In so concluding, we are of course aware that the case-by-case approach to the right to counsel in felony prosecu-

[11] The scope of the practical problem which would be occasioned by a requirement of counsel in all revocation cases is suggested by the fact that in the mid-1960's there were an estimated average of 20,000 adult felony parole revocations and 108,000 adult probation revocations each year. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 56 n. 28 (1967).

tions adopted in *Betts* v. *Brady*, 316 U. S. 455 (1942), was later rejected in favor of a *per se* rule in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). See also *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972). We do not, however, draw from *Gideon* and *Argersinger* the conclusion that a case-by-case approach to furnishing counsel is necessarily inadequate to protect constitutional rights asserted in varying types of proceedings: there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences.

In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented not by a prosecutor but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole. The need for counsel at revocation hearings derives not from the invariable attributes of those hearings but rather from the peculiarities of particular cases.

The differences between a criminal trial and a revocation hearing do not dispose altogether of the argument that under a case-by-case approach there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered only by a lawyer. Without denying that there is some force in this argument, we think it a sufficient answer that we deal here not with the right of an accused to counsel in a criminal prosecution, but with

the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime.[11]

We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.

It is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements. The facts and circumstances in preliminary and final hearings are susceptible of almost infinite variation, and a considerable discretion must be allowed the responsible agency in making the decision. Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not com-

[11] *Cf. In re Gault*, 387 U. S. 1 (1967), establishing a juvenile's right to appointed counsel in a delinquency proceeding which while denominated civil was functionally akin to a criminal trial. A juvenile charged with violation of a generally applicable statute is differently situated from an already-convicted probationer or parolee, and is entitled to a higher degree of protection. *See In re Winship*, 397 U. S. 358 (1970) (the standard of proof in a juvenile delinquency proceeding must be "proof beyond a reasonable doubt").

mitted the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.

IV

We return to the facts of the present case. Because respondent was not afforded either a preliminary hearing or a final hearing, the revocation of his probation did not meet the standards of due process prescribed in *Morrissey*, which we have here held applicable to probation revocations. Accordingly, respondent was entitled to a writ of habeas corpus. On remand, the District Court should allow the State an opportunity to conduct such a hearing. As to whether the State must provide counsel, respondent's admission to having committed another serious crime creates the very sort of situation in which counsel need not ordinarily be provided. But because of respondent's subsequent assertions regarding that admission, see p. 2, *ante*, we conclude that the failure of the Department to provide respondent with the assistance of counsel should be re-examined in light of this opinion. The general guidelines outlined above should be applied in the first instance by those charged with conducting the revocation hearing.

Affirmed in part, reversed in part, and remanded.

MR. JUSTICE DOUGLAS, dissenting in part.

I believe that due process requires the appointment of counsel in this case because of the claim that respondent's confession of the burglary was made under coercion. See *Morrissey* v. *Brewer*, 408 U. S. 471, 498.